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NO. 78-1529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

N. B. HUNT, W. H. HUNT, DOUGLAS HUNT, HOUSTON HUNT, ELIZABETH HUNT CURNES, ELLEN HUNT FLOWERS, MARY HUNT HUDDLESTON, AND HUNT HOLDINGS, INC., *Petitioners,*

vs.

THE COMMODITY FUTURES TRADING COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

N. B. Hunt, W. H. Hunt, Douglas Hunt, Houston Hunt, Elizabeth Hunt Curnes, Ellen Hunt Flowers, Mary Hunt Huddleston, and Hunt Holdings, Inc., hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed a decision of the United States District Court for the Northern District of Illinois.

ORDERS AND OPINIONS BELOW.

The decision of the Court of Appeals (Pet. App. pp. 1a-18a)[1] is reported at Comm. Fut. L. Rep. (CCH) § 29,727, and the decision of the Northern District of Illinois (Pet. App. pp. 24a-31a) is reported at Comm. Fut. L. Rep. (CCH) § 20,496.

JURISDICTION.

The Decision and Judgment of the Court of Appeals was entered on January 8, 1979 (Pet. App. p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

Where the Commodity Futures Trading Commission ("CFTC") has invoked the plenary jurisdiction of a federal district court pursuant to § 6c of the Commodity Exchange Act, as amended, 7 U.S.C. § 1 *et seq.* ("Act"), seeking complete relief in a full trial on the merits, can the CFTC conduct a subsequent administrative enforcement action under §§ 6(b) and 6(c) of the Act asserting the identical cause of action against the same parties, involving exactly the same evidence and issues, and seeking essentially the same relief available in the judicial enforcement action?

STATUTES AND REGULATIONS INVOLVED.

The relevant portions of §§ 4a, 6(b), 6(c) and 6c of Commodity Exchange Act, as amended, 7 U.S.C. §§ 6a, 9, 13(b) and 13a-1, respectively, and CFTC Regulation 150.4, 17 C.F.R. § 150.4, are set forth in Pet. App. at pp. 79a-82a[2].

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[1] "Pet.App." refers to the Petitioners' Appendix which is attached to this Petition.

[2] Sections 6(c) and 6c are separate sections of the Act.

STATEMENT OF THE CASE.

I. Introduction.

The CFTC is authorized to institute judicial enforcement actions in federal district court pursuant to § 6c of the Act and administrative enforcement actions before the agency pursuant to §§ 6(b) and (c) of the Act to prohibit any act or practice in violation of or to enforce compliance with any provision of the Act, or any rule, regulation or order thereunder. Section 6c of the Act provides that where the CFTC elects to institute suit in federal court:

> "... said courts shall have jurisdiction to entertain such actions. ...*** Where the Commission *elects* to bring the action [in the courts], it shall inform the Attorney General of such suit and advise him of subsequent developments. (7 U.S.C. § 6a) (Bracketed material supplied) (Emphasis added) (Pet. App. p. 81a).

In addition to the Act's express provisions, the legislative history of the Act establishes that Congress did not empower the CFTC to supplement or collaterally attack a judicial decision obtained pursuant to § 6c by instituting an administrative action under §§ 6(b) and (c). For example, the House Committee stated with regard to § 6c of the Act that:

> "The Committee assumes that there will be an informal determination by the Commission that other remedies provided by this or other Acts are inadequate or not realistic to the fact situation then being addressed by the Commission before seeking an injunction." (H.R. Rep. No. 93-975, 93 Cong. 2nd Sess. 30 (1974)).

With respect to the instant matter, the CFTC elected to seek complete relief from the district court in a judicial enforcement action, but subsequently became dissatisfied with the district court's preliminary rulings and apprehensive about the eventual outcome of the case. While continuing to press the judicial enforcement action, the CFTC instituted an administrative enforcement action against the same parties based on the identical cause of action, issues and facts.

Trials on the merits in both actions are to be conducted in the near future at or about the same time with regard to petitioners' 1977 soybean futures contract trading on the Chicago Board of Trade. The CFTC asserts in both actions that such trading was done pursuant to an express or implied agreement which constituted a technical violation of the three million bushel speculative limit established by 17 C.F.R. § 150.4.

The instant Petition for Writ of Certiorari arises from an action filed by petitioners in the district court to enjoin the duplicate administrative enforcement action. Even though the CFTC originally lodged the entire case with the court, even though the administrative enforcement action is based solely on the court record, and even though the ALJ and the full Commission had addressed the question of the CFTC's power to prosecute dual proceedings, the Court of Appeals held that the doctrine of exhaustion of administrative remedies precludes judicial review except in an appeal from final agency action.

The need for this Court's supervision over the conflict between court and agency in the present action is delineated in cogent fashion by the dissent of the Honorable Howard T. Markey[3] (Pet. App. pp. 7a-18a). The Court of Appeals' acquiescence to duplicate judicial and administrative actions presents important questions regarding statutory construction of the Act, due process of law and separation of powers which have not, but should be, settled by this Court. Further, the lower court's misapplication of the exhaustion doctrine is a rejection of applicable decisions of this Court.

II. The Judicial Enforcement Action.

The judicial enforcement action originated on April 28, 1977, when the CFTC invoked the plenary jurisdiction of the federal district court under § 6c of the Act by instituting an

[3] The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

action styled *CFTC* v. *N. B. Hunt, et al.*, N. D. Ill., No. 77 C 1489, alleging that petitioners' combined soybean futures contract positions were held pursuant to an express or implied agreement or understanding and exceeded the CFTC's 3,000,000 bushel speculative limit in violation of § 4a of the Act and Regulation 150.4. (Pet. App. pp. 21a-22a). The CFTC requested the district court to grant a temporary restraining order and preliminary and permanent injunctive relief prohibiting the asserted violation, order liquidation of petitioners' positions, compel defendants to disgorge any profits, and grant all other necessary and proper relief. A copy of the complaint in the judicial enforcement action is set forth at Pet. App. pp. 19a-23a.

On May 2, 1977, at the outset of the judicial enforcement action, the CFTC advised the district court that the court's jurisdiction had been invoked pursuant to § 6c of the Act in lieu of an administrative enforcement action under §§6(b) and (c) of the Act, as follows:

> Mr. Stewart (Counsel for CFTC): "I was just going to point out that the Commission has chosen this (judicial enforcement action) as opposed to other possible avenues that they could have taken." (*CFTC* v. *N.B. Hunt, et al.*, N. D. Ill., No. 77 C 1489, May 2, 1977 Tr., p. 44).

The CFTC has also admitted that

> "[I]t is well settled that when Congress entrusts injunctive jurisdiction to the district courts for the enforcement of statutory prohibitions, the district courts are thereby granted authority to exercise all of their equitable powers to provide the full relief necessary to effectuate statutory objectives." (Reply and Answering Brief of Appellants, *CFTC* v. *N.B. Hunt, et al.*, C.A. 7th, Con.Nos. 77-1672,-2086 and -2087, p. 26).
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> * * *
>
> "[T]he district court has discretion how best to fashion an appropriate remedy; and it is conceivable that the court might be able to vindicate the Congressional purpose through a form different from that which the Commission has requested. (Brief for Appellants, *CFTC* v. *N. B. Hunt*, C.A. 7th, Doc. No. 77-1474, p. 38).

On May 6, 1977, the district court denied the CFTC's request for a temporary restraining order on the grounds that no violation had been proven and that no market effect or emergency existed. (*CFTC* v. *N. B. Hunt, et al.*, N. D. Ill., No. 77 C 1489, May 6, 1977 Tr., pp. 341-342). The CFTC took an interlocutory appeal, but the district court's order was affirmed by the Seventh Circuit on May 12, 1977. (*CFTC* v. *N. B. Hunt*, C.A. 7th, Doc. No. 1474). The parties thereafter engaged in extensive discovery and trial proceedings in the district court stretching over several months.

On September 28, 1977, the district court entered a Judgment Order and Memorandum Opinion finding that petitioners had violated § 4a of the Act and Regulation 150.4, but denying the CFTC's request for preliminary injunctive relief on the basis of its finding that no likelihood of future violation existed. The district court held that imposition of harsh or punitive remedies was inappropriate because the CFTC had not demonstrated that defendants intended to violate the speculative limit and because the CFTC had stated that the finding of a violation would have the prophylactic effect sought. The district court also denied the request for disgorgement of alleged profits because, *inter alia*, there was no evidence that petitioners intended to violate the law and it was impossible to fashion an equitable decree for a technical violation. The court further determined that no other relief was necessary. A copy of the district court's Memorandum Opinion in the judicial enforcement action is set forth at Pet. App. pp. 24a-31a.

On October 7, 1977, the CFTC appealed from the district court's September 28, 1977 Order,[4] and on January 8, 1979, the

[4] The CFTC's appeal from the September 28, 1977 Order was its third appeal in this matter. In addition to the CFTC's appeal from the district court's denial of the temporary restraining order (*CFTC* v. *N. B. Hunt*, C.A. 7th, Doc. No. 77-1474), the CFTC had also appealed from the district court's order enjoining the CFTC from affecting the soybean futures market through improper press releases regarding petitioners' trading and positions. (*CFTC* v. *N. B. Hunt*, C.A. 7th, Doc. No. 77-1672).

Seventh Circuit affirmed the finding of a violation, but reversed (Markey, J., dissenting) the denial of injunctive relief and remanded the cause to the district court for further proceedings. A copy of the Seventh Circuit's decision in the judicial enforcement action is set forth at Pet. App. pp. 32a-73a. Trial on the merits before the district court on remand is anticipated in the near future.

III. The Administrative Enforcement Action.

After extensive discovery, trial, and the judgment of the district court, on November 28, 1977, the CFTC instituted the administrative enforcement action styled *In the Matter of N. B. Hunt, et al.*, CFTC Docket No. 78-7, in which it asserts the identical cause of action on the same facts and issues and seeks essentially the same relief against the same parties as in the judicial enforcement action. The relief sought in the administrative action is an order pursuant to § 6(b) of the Act prohibiting petitioners from trading on any futures contract market; civil penalties pursuant to § 6(b) of the Act in the amount of $100,000 per violation[5]; and a cease and desist order pursuant to § 6(c) of the Act prohibiting petitioners from further violation of the speculative limit. A copy of the complaint in the administrative enforcement action is set forth at Pet. App. pp. 74a-78a.

In the order which instituted the administrative action, the CFTC incorporated into the administrative record and admitted into evidence the entire record of the judicial enforcement action. (Pet. App. p. 77a). On April 20, 1978, counsel for the CFTC advised the ALJ that the CFTC would not present any

[5] In view of the fact that petitioners were soybean futures traders, the CFTC's request for civil penalties of $100,000 per violation is patently unfounded, since under § 6(b) of the Act this remedy is available only with respect to commodity trading advisors, commodity pool operators, floor brokers, and registered futures commission merchants and persons associated therewith. (Pet. App. p. 80a).

evidence in addition to that in the court record. (Appellants' Suggestion of Additional Authorities, filed April 26, 1978, *N. B. Hunt, et al.* v. *CFTC,* C.A. 7th Cir., No. 77-1055, p. A-1).

The CFTC unabashedly advised the Court of Appeals that both the judicial and administrative actions are identical, as follows:

> "Prior to the commencement of the administrative proceeding, the Commission had brought an action against the Hunts in the court below in which the Commission alleged the *same* violations of law as are involved in the administrative case." (Answer Brief and Supplemental Appendix of CFTC, dated March 13, 1978, *N.B. Hunt, et al.* v. *CFTC,* C.A. 7th, No. 78-1055, p. 3).
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> "The administrative complaint charged the Hunts with speculative limits violations *identical* to those that the Commission had alleged in its injunction action." (*Id.,* p. 9) (Emphasis added).

Likewise, the CFTC advised the ALJ that:

> "The administrative complaint issued by the Commission is, in all material respects, *identical* to the one filed in the District Court on April 28, 1977."
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> * * *
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> "The threshold issue before this Court (sic), like that before the District Court, is whether or not respondents acted pursuant to an "expressed or implied agreement or understanding (in violation of) Regulation 150.4." Appendix to Brief of Appellants, *N. B. Hunt, et al.* v. *CFTC,* C.A. 7th, No. 77-1055, pp. 51-52).
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> "[U]nder the doctrine of collateral estoppel there are no genuine issues of material fact in the (administrative action) . . ." (*Id.,* p. 62) (Emphasis added).

The CFTC seeks to justify these dual proceedings on the ground that, unlike the judicial enforcement action which is assertedly concerned with future and ongoing violations, the

purpose of the administrative action is to punish the petitioners for past technical violations of the speculative limit, as follows:

> Mr. Peter Berman (Counsel for the CFTC): "The present (administrative) case, on the other hand, is seeking administrative sanctions of a penal nature to redress past violations of the law." (Appellants' Suggestion of Additional Authorities, filed April 26, 1978, *N. B. Hunt, et al.* v. *CFTC,* C.A. 7th, No. 77-1055, p. A-2).

Similarly the CFTC informed the lower court that the administrative enforcement action is justified as

> ". . . seeking remedial sanctions to punish violations of the law." (Appendix to Brief of Appellants', *N. B. Hunt, et al.* v. *CFTC,* C.A. 7th, No. 77-1055, p. 55).[6]

The CFTC takes the position that the potential for inconsistent results in the two identical actions is inconsequential:

> Mr. Peter Berman: "[W]hatever happened in the District Court (in the judicial enforcement action) is irrelevant to what happen(s) here (in the administrative action)." (*In the Matter of N. B. Hunt, et al.,* CFTC Docket No. 78-7, April 20, 1978 Tr., p. 55).

Thus, the CFTC maintains that the assertions made and results reached in these two identical actions are totally unrelated.

The ALJ denied a motion by petitioners to dismiss the duplicate administrative action, and the full commission thereafter denied petitioners' Application for Interlocutory Review on the novel ground that petitioners had not exhausted their judicial remedies, *i.e.,* the CFTC declined to make a ruling on the ground that the question whether duplicate enforcement

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[6] Notwithstanding the representation to the appellate court that the administrative action concerned past violations, the CFTC informed the ALJ that it concerned future violations: "Public policy dictates that (the administrative enforcement action) dispose of this entire matter in the normal course of its business in order to deter any *future* violations of the law." (*In the Matter of N.B. Hunt, et al.,* CFTC Docket No. 78-7, April 20, 1978 Tr., p. 9) (Emphasis added).

actions can be prosecuted is pending before the courts. (See *In the Matter of N. B. Hunt, et al.,* CFTC Doc. No. 78-7, Comm. Fut. L. Rep. (CCH) ¶ 20,650). The dilemma faced by petitioners is that the CFTC refuses to address the issue of duplicate actions in the administrative enforcement action because the question is properly before the courts, yet the courts below have declined to address the question on the ground that the matter should be determined in the first instance by the CFTC.

IV. Petitioners' Injunction Action.

This instant Petition for Writ of Certiorari arises out of an action filed by petitioners on December 13, 1977, styled *N. B. Hunt, et al. v. CFTC,* N. D. Ill., No. 77 C 4618, to enjoin the CFTC's duplicitous administrative action. On December 23, 1977, the district court denied petitioners' request for preliminary injunctive relief, and on January 8, 1979, the Seventh Circuit affirmed on the ground that the doctrine of exhaustion of administrative remedies limits judicial relief under these circumstances to review from final agency action.

Despite the fact that the entire matter was already before the courts at the CFTC's behest, despite the fact that CFTC's attorney stipulated that the evidence to be presented in both actions would be exactly the same, and despite the fact that both the ALJ and the full Commission have addressed this question of law, the lower courts held that the question whether the duplicative administrative action is precluded cannot be determined by the courts until after that action is completed.

Dissenting from the majority opinion, Judge Markey articulated the need for the coordination of the roles of court and agency, as follows:

> "(The Court's majority opinion is) an unwarranted abdication of the judicial role. It is not too strong to that

> application of the exhaustion doctrine in this instance obscures, if it does not obliterate, the line between judicial deference and judicial surrender." (Pet. App. p. 7a).
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> "[T]o apply the exhaustion doctrine is to turn it on its head, to judicially approve interrupted agency action, to accept *agency* review of *judicial* action, to endorse regulatory end-runs around the justice system, and to judicially countenance an administrative abuse of the judicial process." (*Id.,* pp. 7a-8a).
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> "Obviously dissatisfied with the outcome in the district court, and uncertain of the outcome here, the Commission has, in effect, constituted itself a quasi-appellate tribunal, prepared to grant itself relief not obtained in the district court. In so electing, the Commission is thus conducting a disjointed, interrupted and repetitive investigation, one of the evils sought to be prevented by the exhaustion doctrine. At the same time, in asserting that this court may review the present administrative proceeding at some future date, the Commission exhibits a willingness to unnecessarily expend judicial resources, the other evil sought to be prevented by the exhaustion doctrine." (*Id.,* p. 9a-10a).
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> "In asserting a naked "right" to institute its administrative proceeding, on the same facts and allegations involved in the judicial process it initiated, and during the course of that judicial process, the Commission's words reflect an attitude perhaps subliminal, but uncomfortably close to contempt for the courts as mere agency appendages." (*Id.,* p. 10a).
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> "A decent respect for the courts would appear to preclude concurrent conduct of both judicial and administrative processes on the same facts and allegations in this case." (*Id.,* p. 12a).
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> "The Commission dismisses the contention that it is violating the separation of powers doctrine solely on the assertion that it has remedial powers not available to the courts. In confusing its remedial powers with a naked right to independent, simultaneous determination of substantive rights on the same facts currently before this court, the

Commission demonstrates that we deal here not merely with agency exuberance, but with agency exhaltation." (*Id.*, p. 14a).

As demonstrated by Judge Markey's dissent, the question of the CFTC's power to prosecute parallel actions based on the same cause of action against the same parties at the same time for essentially the same relief presents fundamental and important issues regarding the constitutional and statutory relationship between courts and agencies as well as the integrity and finality of the judicial process.

REASONS FOR GRANTING WRIT.

I. THE CFTC'S DUPLICATIVE ADMINISTRATIVE ENFORCEMENT ACTION UNDERMINES THE INTEGRITY OF THE JUDICIAL PROCESS AND IMPINGES UPON CONSTITUTIONAL DUE PROCESS OF LAW AND SEPARATION OF POWERS.

This Court should not tolerate the CFTC's abuse of the judicial process. The lower courts' acquiescence to the CFTC's duplicitous enforcement actions sets a precedent of far reaching national importance, which the dissenting opinion suggests as crossing "the line between judicial deference and judicial surrender" and which has extensive impact on the finality of judicial determinations and the relationship between courts and agencies. In Judge Markey's view, the decision below renders the judiciary "irrelevant" and condones "*agency* review of *judicial* action." (Pet. App. p. 7a).

In *United States* v. *Morgan*, 307 U.S. 183 (1939), this Court stated:

> "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action." (307 U.S. at 191).

The precedent in the instant case, on the other hand, condones uncoördinated actions engendering potentially conflicting decisions and extravagant waste of judicial resources.

The Act cannot be reasonably construed to afford the CFTC complete relief for an alleged technical violation through the federal court system and, at the same time, afford it the power to overrule the decision reached by the court through an independent administrative action. Section 6c of the Act expressly provides that actions which the CFTC elects to institute in district court shall be within the court's jurisdiction, and the legislative history establishes that Congress intended that the CFTC's judicial and administrative remedies be alternative. (See H.R. Rep. No. 93-975, 93 Cong. 2nd Sess. 30(1974)).

If the judicial decision on remand is rendered first, the CFTC in effect assumes the power to review the court's decision and grant to itself, through the administrative action, any relief denied by the court. If, on the other hand, the administrative action is completed first, the judicial action will be rendered totally superfluous, notwithstanding extensive trial and appellate proceedings. In either case, if litigation in both actions is completed, conflicting decisions are all but inevitable. Otherwise, there is no reason why the subsequent administrative action was filed.

Duplicate actions cannot be justified on the ground that some emergency justifies judicial relief in aid of the remedies available through administrative proceedings. As the appellate court affirmed in the CFTC's first appeal in this case, no emergency has ever existed in this matter. Both the judicial and administrative enforcement actions merely involve an alleged technical violation of the CFTC's speculative limit.

Likewise, separate actions cannot be justified on the ground that different remedies are requested in the two actions. There can be no question that a United States district court

sitting in equity has jurisdiction to enjoin traders from utilizing commodities futures markets or from violating the speculative limit. As for the CFTC's request for penalties, since petitioners are traders, the CFTC does not have jurisdiction under § 6(b) to award such relief in the administrative action, *supra* at fn. 5. Moreover, although the CFTC did not specifically seek such sanctions in the judicial enforcement action, the court could have awarded such relief or its equivalent.

The CFTC's regulations recognize the evil inherent in duplicate actions. With respect to administrative reparations actions instituted by futures contract traders against a broker, CFTC Regulation 12.21(a)(7), 17 C.F.R. 12.21(a)(7), requires an allegation whether civil litigation or arbitration proceedings have been utilized, and the Preamble to the CFTC's Rules and Regulations relating to reparations actions states that such prior actions constitute a waiver of administrative reparations remedies. (41 Fed. Reg. 3994, January 27, 1976). Where it is the CFTC which has utilized civil court litigation, the same principle should bar duplicate administrative enforcement actions.

Moreover, the CFTC's order instituting the administrative action which incorporates the judicial record in the administrative proceeding, *supra* at p. 7, violates CFTC Regulation § 10.42, 17 C.F.R. § 10.42, which strictly limits discovery in administrative actions to requests to admit (except where a prospective witness is unable to testify). The CFTC's use of the judicial enforcement action to circumvent discovery limitations in the administrative enforcement action is a misuse of discovery procedures under the Federal Rules of Civil Procedure.

Finally, the CFTC has held in reparations proceedings that administrative actions to penalize past violations of the law are unauthorized. For example, see *Barker* v. *Commodity Management Systems, Inc.*, Comm. Fut. L. Rep. (CCH) ¶20, 432, where the CFTC held that "The Commodity Exchange Act does not provide for punitive or exemplary damages, or for

damages unrelated to violations of the Act or the Rules of the Commission." (*Id.*, p. 21, 756). Also see *Beck* v. *Securities and Exchange Commission,* 430 F.2d 673, 675 (6th Cir. 1970), regarding the impropriety of an SEC order awarding punitive, as distinguished from remedial, relief.

In *California* v. *Federal Power Commission,* 369 U.S. 482 (1962), the Government commenced a judicial action alleging that a gas company's acquisition of the stock of a pipe company violated the Clayton Act. Subsequently, the gas company applied to the FPC for authority to acquire the pipe company's assets. Noting the waste of time and money and unnecessary confusion which would be created by potentially inconsistent results, this Court held that the FPC should not proceed to a decision on the merits of the merger application in view of the pendency of the action in the courts challenging the validity of the transaction under the antitrust laws, as follows:

> "We rule only on one select issue and that is: should the Commission proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of the transaction under the antitrust laws. We think not. We think the Commission should await the decision of the courts."
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> * * *
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> "The orderly procedure is for the Commission to await decision in an antitrust suit before taking action." (*Id.*, at 487-489).

The same principle should apply *a fortiori* in the instant action which, unlike *California* v. *FPC, supra,* involves the same party asserting the same actions.

The CFTC, having elected to complain as plaintiff in the district court, is prohibited by due process of law and separation of powers from interfering with the court's jurisdiction. While "forum shopping" is permitted by the Act, the CFTC is not authorized to prosecute two actions where one will suffice or to

shift from one forum to another. See *Kerotest Mfr. Co.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952), where this Court recognized that "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" required an injunction limiting the litigation to the prosecution of a single suit.[7]

The issue presented by this Petition is especially ripe for consideration since no trial on the merits has been held in either case. This Court should not tolerate the CFTC's disregard of judicial economy and disrespect for judicial process. Comity is not a unilateral concept. If the courts are required to defer to administrative agencies in proper cases under the doctrines of exhaustion of administrative remedies and primary jurisdiction, administrative agencies should be required to defer to the courts where the agency invokes the court's plenary jurisdiction in the first instance. Under these circumstances, constitutional due process of law, separation of powers and the Act preclude the agency from proceeding independently with a separate, *albeit* identical administrative action.[8]

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[7] Also see *Binderup* v. *Pathe Exchange Inc.*, 263 U.S. 291, 305 (1925): "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as fact"; and *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210, 226 (1908): "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end".

[8] Intricate questions of *res judicata* and collateral estoppel will arise when the district court enters a final judgment. In fact, following the district court's Order dated September 28, 1977, in the judicial enforcement action, the CFTC took the position that the court's order was a final decision on the merits and that "... under the doctrine of collateral estoppel there (were) no genuine issues of material fact (in the administrative action)." (Appendix to Brief of Appellants, *N.B. Hunt, et al.* v. *CFTC*, C.A. 7th, No. 77-1055, pp. 61-62). (On February 15, 1978, however, the CFTC filed an Addendum to Motion for Summary Disposition in the administrative enforcement action in which it purported to withdraw its reliance on the doctrine).

II. THE LOWER COURTS' MISAPPLICATION OF THE EXHAUSTION DOCTRINE IS IN CONFLICT WITH VARIOUS DECISIONS OF THIS COURT.

In *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969), this Court explained that exhaustion is generally required where the relevant statute creates exclusive administrative procedures which promote the agency's efficient operation, afford the parties and the courts the benefit of the agency's experience and expertise, and permit the agency to develop the necessary factual background. The doctrine, however, has been held inapplicable where the question presented is purely one of law, the agency is violating a clear right secured by statute or agency regulation, or the issue cannot be raised upon judicial review from final agency action. See generally 3 K. Davis, Administrative Law Treatise § 20.01 *et seq.* (1958 ed. 1965 Supp.).

A. *The exhaustion doctrine should not be invoked where the purposes served by the doctrine are defeated by its application.*

As Judge Markey stated in his dissenting opinion in the instant action, application of the exhaustion doctrine here constitutes judicial approval of "disjointed, interrupted and repetitive" actions and "unnecessarily expends judicial resources", the evils which the doctrine seeks to prevent. (Pet. App. p. 10a).

In *McKart, supra,* this Court stated that

> "Application of the [exhaustion] doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." (395 U.S. at 193-194).
>
> * * *
>
> "[C]ases decided by this Court [do not] stand for the proposition that the exhaustion doctrine must be applied blindly in every case." (*Id.*, at 201).

The CFTC's contention that the courts will not become involved if petitioners are successful in the administrative action is absurd. Since the courts are already involved with the entire

case in the judicial enforcement action, it is not a question whether the courts will become involved at all, but rather, whether the courts will become involved twice—the second time following final agency action. While it may generally be desirable to let the agency develop the necessary factual background, here the administrative action is based on the record developed by the court. While it may generally be desirable to afford the agency an opportunity to utilize its expertise, here the CFTC relies on the court's expertise. While it may generally be more efficient for an administrative action to be completed without interruption, here relitigation of the same cause of action in the administrative enforcement action is obviously wasteful of judicial resources.

Myers v. *Bethlehem Ship Building Corp.*, 303 U.S. 41 (1938), is distinguishable from the instant action. In *Myers* the company brought an action in district court to enjoin a NLRB proceeding on the ground that the company's facility was not in interstate commerce and was therefore not within the NLRB's jurisdiction. Since the question whether the company was engaged in interstate commerce was one of fact and since Congress had conferred exclusive jurisdiction on the NLRB to resolve such matters, this Court held that the administrative action should not be interrupted.

The instant action is distinguishable from the *Myers* decision for a number of reasons. First, in *Myers* the NLRB had exclusive jurisdiction whereas here the CFTC may elect to bring the action either in the district court or before the CFTC.[9]

[9] Although § 2 of the Act, 7 U.S.C. § 2, confers "exclusive jurisdiction" on the CFTC with respect to futures transactions, this section also provides that "Nothing in this section shall supercede or limit the jurisdiction conferred on courts of the United States . . ." In addition, as noted *supra* at p. 3, § 6c expressly confers jurisdiction on the district courts with respect to enforcement actions and makes it clear that Congress intended the CFTC to be subject to the doctrine of election of forums.

Second, in *Myers* the issue whether the company was in interstate commerce presented a question of fact whereas here the CFTC's power to institute simultaneous actions under § 6c and §§ 6(b) and (c) is a question of law. Third, in *Myers* the question whether the company was in interstate commerce had not been determined by the NLRB whereas here the question whether the CFTC has power to prosecute duplicate actions has been addressed by both the ALJ and the full Commission on review. Fourth, here the CFTC lodged the entire matter with the court in the first instance seeking the court's expertise and ability to marshall the facts. Fifth, the CFTC's expertise and experience can be made available to the court in the judicial enforcement action.

B. The exhaustion doctrine should not be invoked where the sole question presented is whether the agency, as a matter of law, has statutory power to prosecute duplicative enforcement actions.

The issue whether the CFTC has power to conduct duplicative and repetitive judicial and administrative actions presents a purely legal question of the statutory construction of § 6c and §§ 6(b) and (c) of the Act. In *McKart* v. *United States, supra,* the issue was whether the petitioner was a sole surviving son within the meaning of the selective service laws. Since this issue was solely a question of statutory interpretation, the Court held that the exhaustion doctrine did not apply. (395 U.S. at 197-198).

Certiorari should be granted in the instant case if only to rectify the Seventh Circuit's rejection of the principle established by this Court in *McKart.* See the appellate court's decision where it is stated that "The supposed doctrine (that the exhaustion doctrine does not apply to questions of law involving statutory construction) has been explicitly rejected by this court." (Pet. App. p. 5a). This direct conflict between this Court's decision in *McKart, supra,* and the instant case should not be permitted to stand.

C. The exhaustion doctrine should not be invoked where the CFTC has waived its jurisdiction to decide the case by invoking the district court's plenary jurisdiction and by addressing the issues in the administrative action.

The CFTC waived any requirement that petitioners exhaust administrative remedies when it filed the judicial enforcement action and litigated the case for months in the district and appellate courts. If the CFTC may have resort to the courts with respect to the complex factual questions involved in the judicial enforcement action, the petitioners should not be denied access to the courts with regard to the purely legal questions raised here. Having sought complete judicial relief, the CFTC has waived any requirement that petitioners exhaust administrative remedies. *cf. Barker* v. *Commodity Management Systems, Inc.*, Comm. Fut. L. Rep. (CCH) ¶20,432.

Moreover, the CFTC has addressed the question at issue and for all practical purposes the administrative process in that regard is at an end. The ALJ denied petitioners' motion to dismiss, and the full Commission denied petitioners' Application for Interlocutory Review on the ground jurisdiction rests with the courts, *supra* at pp. 9-10. Under these circumstances, no useful or legitimate purpose is served by deferring judicial review until completion of the administrative action.

In *Mathews* v. *Diaz*, 426 U.S. 67, 77(1976), a class action in the district court attacking the Social Security Administration's statutory construction of the claimant's qualification for the Medicare program, the named plaintiff did not seek administrative remedies until after the judicial action was filed and never completely exhausted all avenues of administrative review. In view of the Government's stipulation that no facts were in dispute and its submission of the matter for summary disposition, this Court held that the Government's action was tantamount to final agency action and a waiver of the exhaustion requirements. Similarly, see *Mathews* v. *Eldridge*, 424 U.S.

319, 330 (1976), and *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975), recognizing the court's jurisdiction prior to final agency action where further administrative proceedings would be futile or otherwise inappropriate.

D. The exhaustion doctrine should not be invoked where judicial review from final agency action may be foreclosed.

The standard of review in an appeal from an agency determination is established by Section 6(b) of the Act:

> "... the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission, *as to the facts*, if supported by the weight of the evidence shall in like manner be conclusive." (7 U.S.C. § 13b) (Emphasis added) (Pet. App. p. 80a).

In an appeal from final agency action pursuant to § 6(b) of the Act, petitioners may be precluded from challenging the CFTC's statutory authority to institute the administrative enforcement action. In *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562 (1919), an action to enjoin the enforcement of an ICC order was brought in district court before the ICC's decision had become final. This Court held that the question whether the administrative order was in excess of the ICC's powers could be determined in the independent judicial action prior to final action by the agency because the question was outside the scope of review in an appeal from final agency action.

CONCLUSION

The instant action presents unique questions of national importance regarding the relationship between courts and agencies, constitutional due process of law, separation of powers, the statutory construction of the Commodity Exchange Act, and the enforcement powers of the CFTC.

The CFTC's duplicate proceeding is more than an abuse of the judicial process, it is a studied and deliberate denigration of the courts by an administrative agency. As Judge Markey observed in the dissenting opinion:

> "Obviously dissatisfied with the outcome in the district court, and uncertain of the outcome here, the Commission has, in effect, constituted itself a quasi-appellate tribunal, prepared to grant itself relief not obtained in the district court." (Pet. App. p. 9a-10a).

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 78-1055

NELSON BUNKER HUNT, W. H. HUNT, ELLEN H. FLOWERS, MARY H. HUDDLESTON, ELIZABETH H. CURNES, HOUSTON B. HUNT, DOUGLAS H. HUNT, and HUNT HOLDINGS, INC.,

Plaintiffs-Appellants,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-4618—**Frank J. McGarr**, *Judge.*

ARGUED APRIL 26, 1978—DECIDED JANUARY 8, 1979

Before SWYGERT, *Circuit Judge*, MARKEY, *Chief Judge*,[1] and TONE, *Circuit Judge.*

SWYGERT, *Circuit Judge.* The principal question before us is whether parties involved in administrative proceedings before the Commodity Futures Trading Commission must exhaust their administrative remedies prior to seeking judicial review of the Commission's

[1] The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

authority to bring the administrative action when the Commission has previously brought a similar, court enforcement action against the same parties. We hold that administrative remedies must be exhausted and sustain the district court's denial of the appellants' motion for a preliminary injunction halting the administrative proceedings.

On November 28, 1977 the Commodity Futures Trading Commission instituted administrative proceedings against seven members of the Hunt family and an affiliated company for violating the speculative trading limits for soybean futures set by the Commission pursuant to section 4a(1) of the Commodity Exchange Act, 7 U.S.C. § 6a(1) (1976). The transactions that constitute the factual basis for the Commission's action are chronicled in a companion case decided today. *Commodity Futures Trading Comm. v. Hunt*, No. 77-1672 (7th Cir., Nov. ....., 1978) ("*Hunt I*").[2] In that case the Commission brought an action in the United States district court based on the same violations of law involved in the administrative proceedings, but seeking different relief. 7 U.S.C. § 13a-1. The district court found that the Hunts had violated provisions of the Commodity Exchange Act, but denied the Commission's motions for an injunction and ancillary relief. *Commodity Futures Trading Comm. v. Hunt*, No. 77-C-1489 (N.D. Ill., Sept. 28, 1977). On appeal we upheld the trial court's conclusion that the Hunts had violated the statute. We reversed, however, the trial court's denial of injunctive and ancillary relief and remanded those issues for proceedings not inconsistent with our opinion. *Hunt I, supra.*

On December 13, 1977 the Hunts filed a complaint in support of their request that the district court enjoin the administrative proceedings before the Commodity Futures Trading Commission. At a hearing held December 14, the district court denied the Hunts' request for a temporary restraining order. On December 23, 1977 the district court denied their motion for a preliminary injunction.

[2] The record from the three appeals consolidated for hearing in *Hunt I* was made part of the record in this case in April 1978.

On appeal the Hunts offer several grounds for their contention that the administrative proceedings should be enjoined. Most importantly, the Hunts argue that because the Commission previously decided to bring an enforcement action in district court, it is barred from initiating administrative proceedings pursuant to section 6(c) of the Act. 7 U.S.C. § 13b (1967). They also contend that the Commission has violated its own discovery rules by adopting the evidentiary record developed in the district court for use in the administrative proceedings. None of the arguments advanced by the Hunts, however, is sufficient to overturn the deference courts ordinarily extend to ongoing administrative proceedings.

Judicial review of administrative actions of the Commodity Futures Exchange Commission is provided for in section 6(b) of the Commodity Exchange Act, 7 U.S.C. § 9 (1976). *See Frey v. Commodity Exchange Authority*, 547 F.2d 46, 49 (7th Cir. 1976).[3] The Hunts can present their claims regarding the illegitimacy of the Commission's actions for judicial review after the completion of the administrative process and the entry of a Commission order. Absent special circumstances, the courts will not provide declaratory or injunctive relief interrupting administrative proceedings.

[3] Section 6(b), 7 U.S.C § 9 (1976), states in relevant part:

> After the issuance of the order by the Commission, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition, within fifteen days after the notice of such order is given to the offending person praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and thereupon the Commission shall file in the court the record theretofore made, as provided in section 2112 of Title 28. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission as to the facts, if supported by the weight of the evidence, shall in like manner be conclusive.

It is a "long settled rule of judicial administration that no one is entitled to judicial relief, for a supposed or threatened injury, until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). *See also, e.g., Rosenthal & Co. v. Bagley*, No. 77-C-521, slip op. at 2 (7th Cir., Aug. 10, 1978). *Squillacote v. International Brotherhood of Teamsters (Teamsters I)*, 561 F.2d 31, 37-40 (7th Cir. 1977); *Grutka v. Barbour*, 549 F.2d 5 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977); *Frey, supra*, at 49-50. This rule prevents courts from precipitously reviewing cases which, if the administrative process is allowed to run its course, may result in determinations favorable to a petitioner, thereby rendering his objections moot. *See Rosenthal, supra*, slip op. at 5; *Frey, supra* at 49. Awaiting the conclusion of the administrative proceedings also insures that a record will be developed—including conclusions reached by the agency in its area of expertise—which can facilitate judicial review. *See Teamsters I, supra* at 39. And the exhaustion doctrine curbs frequent, litigious interference with the administrative procedures established by Congress for achieving the agency's goals. *Rosenthal, supra*, slip op. at 5; *Teamsters I, supra* at 38-39.

The exhaustion doctrine, of course, is not absolute. There are exceptional circumstances in which courts will interrupt administrative proceedings. The Hunts argue that their claims fall within such an exception to the exhaustion requirement. One exception, long recognized by the courts, is the "clear right" exception: if an agency would violate a clear right of a petitioner by disregarding a specific and unambiguous statutory, regulatory, or constitutional directive, a court will not require the petitioners to exhaust his administrative remedies and will intervene immediately. *Rosenthal, supra*, slip op. at 5-6; *Teamsters I, supra* at 36. *See Leedom v. Kyne*, 358 U.S. 184 (1958).

The Hunts, however, have failed to establish that the Commission has violated a "clear right." Neither the Commission's decision to institute administrative

proceedings after its previous enforcement efforts before the district court nor its incorporation of the record of the civil action into the administrative proceedings constitute such a violation. There is nothing in the statutory language of the Commodity Exchange Act which indicates that the Commission's initial election of remedies is exclusive, and the legislative history provides little support for the Hunts' position. *See, e.g.*, H. R. Rep. No. 95-1181, 95th Cong., 2d Sess. 51 (1978). The Hunts' allegations regarding the Commission's disregard of its own discovery rules fail to demonstrate that the Commission has violated a clear right. When the implications of one of an agency's own rules is in question, a court should be hesitant to conclude that the agency has disregarded a specific and unambiguous directive warranting judicial intervention in the administrative proceedings. *See Borden, Inc. v. FTC*, 495 F.2d 785, 789 (7th Cir. 1974). And while the Commission's discovery procedures are limited, there is nothing in the Commission's rules explicitly prohibiting the incorporation of evidence compiled in a prior judicial proceeding. *See* also 17 C.F.R. § 10.42(b) (1977). Thus the "clear right" exception does not apply.

The Hunts also contend that the instant case comes within other exceptions to the exhaustion doctrine. One other exception applies to cases in which judicial review effectively will be foreclosed if the court does not intervene in the administrative proceedings. *See Jewel Companies, Inc. v. FTC*, 432 F.2d 1155 (7th Cir. 1970). In the instant case, however, the Hunts will have an opportunity to assert their claims, if necessary, in an appeal from the Commission's final order. 7 U.S.C. § 9 (1976).

The Hunts also argue that the only questions at issue in their appeal are matters of law, not of fact, and therefore the exhaustion requirement does not apply. This argument can be disposed of without determining whether any factual disputes are at issue in the Hunts' appeal. The supposed doctrine which the Hunts employ to advance their position has been explicitly rejected by this court. In *Teamsters I, supra* at 39, we said that the conclusion that a dispute was a "matter of law" would be

insufficient in and of itself to trigger an exception to the exhaustion requirement. *See also Rosenthal, supra.* In the instant case, where no clear right has been violated and judicial review will be available to the petitioners in accordance with the statutory framework of the Commission's proceedings, the exhaustion requirement applies.

The judgment of the district court accordingly is affirmed.

MARKEY *Chief Judge*, dissenting.

With the greatest respect, I dissent from what I consider an unwarranted abdication of the judicial role. It is not too strong to say that application of the exhaustion doctrine in this instance obscures, if it does not obliterate, the line between judicial deference and judicial surrender.

Citing no compelling reason whatever for having instituted an administrative proceeding on the same facts and allegations pending before this court, the Commission says the courts are rendered powerless to enjoin that proceeding by the exhaustion doctrine. That doctrine is of a piece with efforts extant for centuries to avoid multiple litigation. Repeated litigation in the courts is resisted by rules like *res judicata* and collateral estoppel. Simultaneous litigation on the same facts and allegations, the evil occurring here, is resisted in the courts by rules like those concerning venue, transfer, "forum non conveniens," class actions, consolidation and the Panel on Multi-district Litigation. Nonetheless, the Commission says it, and impliedly all similar executive agencies, can do what courts can't and won't do, *i.e.*, conduct simultaneous litigation, because Congress gave it punishment powers not within the arsenal of the courts, arguing thus that Congress intended the incongruous.

The exhaustion doctrine is salutory. Ordinarily, action is initiated and proceeds in orderly fashion to completion within the agency. Withholding of judicial intervention well serves the twin goals of uninterrupted agency action and saving of scarce judicial resources. Judicial involvement may be obviated. If not, judicial review can be conducted on a complete record. The authorities cited by the parties, including those establishing properly limited exceptions to the doctrine, stand unchallenged and insure the continued viability of the doctrine in appropriate cases. Those authorities are of little comfort here, however, where to apply the doctrine is to turn it on its head, to judicially approve interrupted agency action, to accept *agency* review of *judicial* action, to en-

dorse regulatory end-runs around the justice system, and to judicially countenance an administrative abuse of the judicial process.

Chronology supplies the key to what is happening here. The Commission elected to fully employ the judicial process, filing its complaint for plenary, not merely preliminary, relief in the district court in April 1977.[2] The district court having expended substantial

[2] The Commission's unquestioned right to seek merely a preliminary injunction against a violation on an emergency or other valid basis, while it conducts a proceeding, is not here involved. The Commission here sought declaratory judgment of violation, a temporary restraining order, a preliminary injunction, a final permanent injunction, disgorgement of profits, liquidation of excess holdings, and "other" relief. Appellants challenged the regulation itself and sued agency employees. The district court enjoined the Commission from disclosing appellants' trading. The Commission sought a full panoply of relief and relied on the court's expertise, not its own. All of these matters are before this court in Hunt I. It is disingenuous of the Commission's brief, therefore, to excuse its proceeding administratively, *after* the district court's decision, on the ground that it was seeking only preliminary relief from the district court.

The Commission's statement to us that only preliminary relief was sought in the district court is the more startling in light of its position before its Administrative Law Judge (ALJ) in opposing appellants' motion to dismiss the administrative proceeding:

> *The order of the District Court in the matter of the CFTC v. N.B. Hunt, et al., (77 C 1489) satisfies this test.* After the District Court Denied the Commission's original motion for a preliminary injunction, the matter was set for trial. Extensive discovery was conducted by both parties. Several days of testimony was heard by the Court in both June and July of 1977. Findings were proposed by both sides, briefs submitted, *and a final decision rendered. In short, both the CFTC and respondents were accorded a full opportunity for an adversary hearing.* Additionally, the District Court ruling is a *final order* for purposes of appeal; it carries the label of a final order; *it disposes of all of the claims between the parties;* jurisdiction has passed from the District Court to the Court of Appeals; *and the nature of the proceedings was such that the District Court had jurisdiction to render a final decision on the issues.* [Emphasis added.]

resources, and having necessarily deprived others seeking a share of those same limited resources, rendered a final judgment in September, 1977. The Commission and the defendant both appealed from that judgment. The Commission, however, in November, 1977, *after* the final order of the district court and *while the appeal was pending in this court,*[3] instituted an administrative proceeding against the same defendants, on the same facts and making the same allegations of statutory violations, as were and are involved in the judicial process which the Commission initiated and which is *still ongoing.*

Presumably, the Commission conducted some sort of investigation before availing itself of the resources of the district court. It conducted full discovery on all issues before the court. Unwilling to await the decision of this court,[4] *i.e.*, to await an orderly completion of the judicial process, the Commission elected to conduct its investigative function all over again, albeit under the formal label "administrative proceeding." Obviously dissatisfied with the outcome in the district court, and uncertain of the outcome here, the Commission has, in

[3] And without notification to the courts, hardly an example of the "coordinated action" of courts and agencies envisaged by the Court as ideal in *United States v. Morgan*, 307 U.S. 183 at 191. Appellant moved this court to stay the administrative proceedings until this court decides this appeal in Hunt II. That motion should have been granted.

[4] The record reflects no "emergency" extant, and the Commission asserts none before us. The district court's May 6 finding of "no emergency," affirmed by this court, still stands. Indeed, in resisting appellants' motion for this court to enjoin its administrative proceeding, the Commission says appellants should have gone first to the district court because "No emergency exists." The nearest the Commission comes is a reference to the risk of future violations, ignoring completely the district court's contrary finding and the pendency of that question before this court in Hunt I. The only authority it cites for its simultaneous proceedings is *United States v. Kordel*, 347 U.S. 1 (1970), in which the court sanctioned simultaneous criminal and civil court proceedings by the FDA in view of the public interest in protection against misbranded drugs. In *Kordel*, however, the FDA did not institute an administrative proceeding on the same facts and allegations on which a district court had ruled and during the pendency of cross-appeals from those rulings.

effect, constituted itself a quasi-appellate tribunal, prepared to grant itself relief not obtained in the district court. In so electing, the Commission is thus conducting a disjointed, interrupted and repetitive investigation, one of the evils sought to be prevented by the exhaustion doctrine. At the same time, in asserting that this court may review the present administrative proceeding at some future date, the Commission exhibits a willingness to unnecessarily expend judicial resources, the other evil sought to be prevented by the exhaustion doctrine.[5]

The denigration of the courts exhibited by the Commission's actions is repeated in its brief. In asserting a naked "right" to institute its administrative proceeding, on the same facts and allegations involved in the judicial process it initiated, and during the course of that judicial process, the Commission's words reflect an attitude perhaps subliminal, but uncomfortably close to contempt for the courts as mere agency appendages.

First, the Commission relies on the familiar rule that a district court's denial of an injunction is discretionary,

[5] The Commission makes the standard argument that appellants show no irreparable injury, merely a loss of time and money, and says any mistakes it makes can be rectified on appeal. Sympathy for the apparently wealthy appellants is not required. The injury done to the justice system by simultaneous litigation is enough.

Nonetheless, it is idle to pretend that unwarranted waste of time and money by appellants (and by the taxpayers who must fund the Commission and the courts) is "reparable" in a second appeal. Regulatory agencies are essentially immune from responding in damages for even the most flagrantly arbitrary and capricious action. The balance is not easily drawn. Government agencies must be able to act expeditiously in performing their duties to advance the public interest. If public respect for the regulatory process is to be maintained, however, responsible agency action is an imperative. Until Congress shall devise some means for compensating the citizen for time and money lost to unequivocally arbitrary and capricious agency action, the poorer citizen must surrender. Win or lose, only the richer rich can fight. That the great majority of agency actions have been fully responsible, despite a "heads-we-win-tails-you-lose" status, is a tribute to the support of the public interest by dedicated and selfless agency employees.

not to be disturbed absent abuse. Yet the Commission vigorously attacks the same court's denial of the injunction in Hunt I, and its administrative proceeding looks to its own issuance of a cease and desist order, an effective overruling of the district court's denial of the injunction it sought through the judicial process in Hunt I.

Quite apart from honoring the judicial discretion to deny an injunction it praises in this case, the Commission is prepared to ignore it in its administrative proceeding, for all the world as though the district court had never spoken. The Commission vigorously relied on the collateral estoppel effect of the district court trial in successfully resisting appellants' motion to dismiss its administrative proceeding; it tells this court that the district court trial has no collateral estoppel effect. Further, the agency is prepared to issue a cease and desist order in the face of this court's potential affirmance of the district court's injunction denial, as though the judicial process in which this court is presently involved were a nullity.

Next, the Commission praises the exhaustion doctrine (citing cases and language applicable to the ordinary situation in which an effort is made to involve the courts in action initiated within an agency), as precluding "premature" judicial review, as though all of the facts, allegations and law involved in its administrative proceeding were not *already* under judicial review.

It is at best fatuous to assert, as does the Commission: "But, if the administrative process is allowed to go to completion the Hunts might prevail on their motion to dismiss or on the merits or might otherwise persuade the Commission that remedial sanctions are inappropriate. In any of those events, the courts would never have to become involved." Yet the courts are already fully involved with the entire case, and at the behest of the Commission. Moreover, the Commission has made the district court's violation finding of record in its administrative proceeding. Whether appellants' allegation that the Commission is engaged in an administrative vendetta be true or false,[6] the Commission's assertion

[6] The Commission conceded in Hunt I that defendants' activities had no effect on, and posed no threat to, the market. The record in Hunt I clearly confirms that fact.

that it might disregard the violation finding is but another illustration of a willingness to pretend that the district court action (and ours) never occurred.

That the Commission intends to constitute itself an appellate tribunal over the district court is stated unequivocally in its brief: "Even if the administrative law judge should deny the Hunts' motion to dismiss the proceeding and should render an initial decision adverse to them, they may seek review by the Commission. At that time the *Commission, upon an independent review* of the administrative record, can *consider each of the claims* that the Hunts have *asserted in the court below.* To the extent that plaintiffs may demonstrate the merits of their claims and that *prejudicial errors* [Query: by the district court? by this court?] have therefore been made, the *Commission* will have the opportunity to *rectify them* and will presumably do so." (Emphasis added.)

The Commission dismisses concern over conflict between actions it might take in its administrative proceedings, and those consistent with this court's decision and opinion on appeal, with: "It will be soon enough for a court of appeals to consider the matter, when and if a conflict should arise between what this court has said and what the Commission has done." Surely the apparent arrogance, expressed with such amazing aplomb, is unintended. This "court of appeals" is *now* considering the entire "matter" at the behest of the Commission. I find no basis, in law or policy, for a Commission "right" to act in the interim, in potential contravention of the courts' decisions, and then to require this court to "consider the matter" a second time.

A decent respect for the courts would appear to preclude concurrent conduct of both judicial and administrative processes on the same facts and allegations in this case.[7] In the pending appeal (Hunt I), this court

[7] Even when the actions differed (court antitrust suit and Commission approval of asset merger), the Supreme Court said, "We think the Commission in those circumstances should await the decision of the courts." *California v. Federal Power Commission*, 369 U.S. 482 at 487. Here, the Commission's

(Footnote continued on following page)

may (1) affirm or reverse the declaratory finding of a violation; (2) affirm or reverse the district court's denial of an injunction, and (3) remand for further consideration of injunctive relief, disgorgement of profits, liquidation of excess positions, and "other" relief originally and *presently* sought from the courts by the Commission. Yet the Commission, in its simultaneous administrative proceeding, may have by that time barred defendants from the commodity markets, imposed civil money penalties, and applied what its brief calls "criminal" sanctions, rendering our decision in Hunt I superfluous.

It would appear at least as important to the integrity of the judicial process to require the exhaustion of judicial remedies, as it is important to the integrity of the regulatory process to require the exhaustion of administrative remedies. Indeed, a reasonable regard for the exalted exhaustion doctrine would appear to require the Commission to stay its administrative hand, or, if there be a compelling reason to proceed (and none is of record), then to abandon and undo its self-initiated judicial proceeding.

I had not till now thought that anyone would consider deference a one-way street, i.e., that only the judiciary should defer. Nor would I think unholy a requirement that an administrative agency, after initiating full court action, should defer acting on the same facts and allegations until the judicial process be completed. It would not, I think, destroy some "vast eternal plan" if deference, under the non-emergency circumstances here, were a two-way street.

[7] *continued*
Enforcement Division, in its Motion for Summary Disposition, told Commission's ALJ:

> The administrative complaint issued by the Commission in this case is, in all material respects, identical to the one filed in the District Court on April 28, 1977.
>
> * * * *
>
> The threshold issue before this Court [see n.8, *infra*], like that before the District Court, is whether or not respondents acted pursuant to an "expressed or implied agreement or understanding" * * * Regulation 150.4.
>
> * * * *
>
> Moreover, under the doctrine of collateral estoppel there are no genuine issues of material fact in the present case
> * * *.

If the agency continues its administrative proceeding, I cannot see why this court should bother deciding Hunt I. I seek not alone to make the judicial job in Hunt I easier, however, but to make it meaningful. As matters now stand, we are irrelevant.

Perhaps even more importantly, the Commission's brief mirrors the movement toward a self-generated "executive judiciary," with powers not merely equal to but greater than those of the courts established by Article III of the Constitution. The Commission dismisses the contention that it is violating the separation of powers doctrine solely on the assertion that it has remedial powers not available to the courts. In confusing its remedial powers with a naked right to independent, simultaneous determination of substantive rights on the same facts currently before this court, the Commission demonstrates that we deal here not merely with agency exuberance, but with agency exhaltation.[8]

Reminding us that the Supreme Court has long recognized quasi-judicial authority in administrative agencies, the Commission meets the argument that its administrative proceeding will impede the ability of the district court and this court to expeditiously resolve the substantive rights of the parties in Hunt I with this: "Of course, this argument erroneously assumes that all 'the substantive rights of the parties' were in issue before the district court in the injunctive case [Hunt I] and could be decided [*sic*] by that court. To the contrary, however, if violations should be found [*sic*, they *were* by the district court, and are at issue before this court] only the

[8] In its administrative proceeding, the Commission's Enforcement Division moved for "summary disposition," repeatedly and universally referring to the Commission's hearing examiner (now-by-change-of-name Administrative Law Judge) as "this Court," e.g., "The threshold issue before this Court like that before the District Court, is whether or not respondents acted pursuant to an 'expressed or implied agreement or understanding' in acquiring soybean futures contracts, which, when aggregated, exceed the speculative limit established by Regulation 150.4." The district court here involved is referred to in the motion as merely "Frank J. McGarr." The Constitution reposes in the Congress the power to create courts.

Commission may lawfully decide [*sic*] whether the Hunts may enjoy the privilege of further participation in the futures markets and whether civil money penalties should be imposed."[9]

Leaving unmentioned the prayer in its complaint for "such other further relief as the court may deem necessary and proper under the circumstances," the Commission says this:

> In the district court, the Commission sought those forms of equitable relief expressly contemplated under Section 6c of the act—preliminary and permanent injunctions against further violations of the Act—as well as ancillary equitable relief requiring liquidation of unlawful positions and disgorgement of any profits derived from unlawful activity. In contrast, the administrative proceeding has been instituted to determine whether an order should be entered by the Commission disqualifying the Hunts from trading on contract markets for a period of time, assessing civil money penalties against them and directing them to cease and desist from unlawful activity. The imposition of these remedial sanctions are expressly entrusted exclusively to the Commission—and not to a court—under Sections 6(b) and 6(c) of the Act.

[9] Confusing remedies and the facts on which remedies must be based, the Commission says it is not relitigating the same question of fact because the district court ruled "only on its prayer for preliminary relief," totally ignoring the district court's findings that continued violations were unlikely and that defendants may have acted in good faith, its refusal to order disgorgement and liquidation, and its injunction against disclosure, all of which the *Commission* has appealed to this court in Hunt I now pending. Further, if any substantive rights remain to be determined in a trial, after remand from this court in Hunt I, the Commission does not indicate how its simultaneous administrative proceedings and remedies can be consistent with fairness in such a trial or with the integrity of the judicial process, and nowhere indicates any new or different facts remaining to be found in its administrative proceedings. Nor does the Commission indicate how its simultaneous litigation on the same facts comports with justice, the quintessential goal and golden quest of the courts.

and this:

> Federal district courts possess only such power as is expressly conferred by statute or is traditionally inherent in a court of equity. The Act provides no authority to a district court to grant the remedies that may be applied by the Commission in the administrative case and remedial sanctions of these kinds are not within the traditional equity jurisdiction of a district court.[10]

Though the Commission cites no supporting judicial authority, and no statutory language so stating, it says that disqualification from trading, assessment of a civil money penalty and a cease and desist order, "could not be granted in the injuction action," and "could not have been considered in a court forum."[11] It distinguishes *Williamson v. Columbia Gas and Electric Co.*, 186 F.2d 464 (3rd Cir. 1950) (barring relitigation in court on the same wrong and facts even when brought under a different statute), on the sole ground that the recovery sought was there the same, and the remedies it here intends are "different."

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[10] The Commission's brief in Hunt I lauds the equity power of the courts as supporting its "demand" that profits be disgorged, though the statute admittedly makes no provision whatever for that remedy.

[11] The Commission's brief in this case (Hunt II) distinguishes its contemplated cease and desist order as having greater force and effect than a mere court injunction punishable only as a contempt of court:

> Although both an administrative cease and desist order and a court injunction are designed to restrain further violations of law, they are distinct remedies. Failure to obey an injunction carries the sanction of criminal or civil contempt in the court's discretion; on the other hand, noncompliance with an agency's cease and desist order subject the perpetrator to specific criminal penalties set forth in Section 6(c) of the Act of up to one year imprisonment and a $100,000 fine.

The Commission's brief in Hunt I insists that the injunction it there sought should have been granted, referring to the "significant role of injunctive relief," and the "deterrent effect of a possible contempt proceeding."

Continuing to ignore its request to the court for "other" relief, the Commission says that in Hunt I the district court was "not requested to consider administrative sanctions," that it "did not purport to do so in its order," and that it "lacked jurisdiction to entertain such claims for relief."[12] The Commission's statement flies in the face of its own enabling statute, which provides, "Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." 7 U.S.C. § 2. Moreover, the assumption that regulatory agencies may limit the jurisdiction of a court presented with the entire case, by merely tailoring their prayers for relief, leaving the agencies free to conduct simultaneous litigation on the same facts and allegations, is at best monstrous. Only a little less ludicrous is the suggestion that solely because appellate courts have the power to approve or disapprove agency imposition of penalties, a district court could not grant, on a proper showing, an agency request for district court imposition of those penalties determined appropriate by an agency, particularly in light of the language of the very section (6(c), now 7 U.S.C. § 13a-1) relied on by the Commission: "Upon application of the Commission, the district courts * * * shall have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with * * * any * * * order of the Commission."

The Commission's reliance on its remedial powers, as a basis for its absolute right to disregard an on-going judicial process involving the same facts and allegations, ignores the necessity for determination that there be something to be remedied and that the remedy be conso-

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[12] The Commission also says the district court "recognized" and "relied on" the availability of "other remedies" in refusing an injunction in Hunt I. It is at best difficult to suppose that a district court, which denied an injunction, would have rested its denial on an expectation that the agency would frustrate its order by issuance of its own order to cease and desist.

nant with the wrong.[13] Those determinations have been made by the district court and are under consideration in this court, yet the Commission insists on making those determinations simultaneously and independently. It is difficult to visualize a more invidious invasion of the constitutional construct variously labeled as "The Federal Judiciary," the "Third Branch," and "Article III," or of the governmental scheme expressed as the "separation of powers" doctrine.

If the majority remains reluctant to enjoin the continuation of the administrative proceeding, and feels compelled to defer to the Commission, I would respectfully recommend that it defer fully; that it cease the charade in which the court defers on the one hand (Hunt II) to an administrative process, and on the other hand (Hunt I), continues to conduct a potentially wasted judicial process on the same facts and allegations.

If it must defer, the court should (1) terminate instanter all further judicial process in Hunt I and Hunt II, (2) vacate the judgments below in both cases in their entireties, (3) order that the Commission's original complaint be dismissed as prematurely brought, and (4) order that the trial record in Hunt I be expunged. Only those steps, it seems to me, would enable the court in these cases to preserve deference with dignity.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[13] On April 26, 1978, the Commission's Administrative Law Judge certified to the Commission the questions of whether: (1) the administrative proceeding was barred by the district court decision; (2) the violation finding was binding; (3) the non-likelihood of continued violation finding was binding; (4) the good faith finding was binding; (5) application of sanctions by the Commission would be legal if (3) and (4) are answered "yes"; and (6) such sanctions should be imposed "as a matter of policy" if (3) and (4) are answered "yes". On July 20, 1978, the Commission declined to answer those questions.

United States District Court

FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING COMMISSION, *Plaintiff,* v. NELSON BUNKER HUNT, HOUSTON BUNKER HUNT, DOUGLAS HUNT, W. H. HUNT, ELIZABETH BUNKER HUNT, ELLEN HUNT FLOWERS, MARY HUNT HUDDLESTON, HUNT HOLDINGS INC. *Defendants.*	Civil Action No. 77-C-1489

COMPLAINT FOR A TEMPORARY RESTRAINING ORDER FOR MANDATORY RELIEF AND A PRELIMINARY AND PERMANENT INJUNCTION FOR VIOLATIONS OF SECTION 4a OF THE COMMODITY EXCHANGE ACT, AS AMENDED (7 U.S.C. § 6a) AND SECTION 150.4 OF THE REGULATIONS UNDER THE ACT (17 C.F.R. § 150.4)

Plaintiff, Commodity Futures Trading Commission ("Commission") for its complaint alleges:

1. It appears that the defendants, Nelson Bunker Hunt, Houston Bunker Hunt, Douglas Hunt, W. H. Hunt, Elizabeth Bunker Hunt, Ellen Hunt Flowers, Mary Hunt Huddleston, and Hunt Holdings, Inc., and each of them, singly and in concert, directly and indirectly, through the instrumentalities of interstate commerce and through the mails, have engaged, are engaged, and are about to engage in acts and practices which constitute and will constitute violations of Section 4a of the Commodity Exchange Act, as amended, ("Act") (7 U.S.C. § 6a) (Supp. V, 1975)) and Section 150.4 of the Regulations under the Act (17 C.F.R. 150.4 (1976)).

2. Section 150.4 of the Commission's regulations (17 C.F.R. § 150.4) was promulgated by the Commission pursuant to its authority under Section 4a of the Act (7 U.S.C. § 6a). That section is now in effect and was in effect at all times relevant to this complaint.

3. The Commission brings this action pursuant to Section 6c of the Act (7 U.S.C. § 13a-1 (Supp. V, 1975)) to restrain and enjoin the defendants, and each of them, from engaging in and from aiding and abetting the acts and practices set forth herein and for such further equitable relief as may be necessary and appropriate under the circumstances.

4. This Court has jurisdiction of this action pursuant to Section 6c of the Act (7 U.S.C. § 13a-1).

5. Certain of the acts and practices, constituting the violations of law alleged herein have occurred, are occurring and are about to occur within this district and defendants are transacting business within this district.

THE DEFENDANTS

1. W. H. Hunt resides at 4205 McFarland Street, Dallas, Texas, and is the brother of the defendant N. B. Hunt and the father of defendant Douglas Hunt.

2. N. B. Hunt resides at 4508 Lakeside Drive, Dallas, Texas, and is the brother of defendant W. H. Hunt and the father of defendants Houston Bunker Hunt, Ellen Hunt Flowers, Mary Hunt Huddleston, and Elizabeth Bunker Hunt.

3. Douglas Hunt resides at 5903 Sandhurst, Dallas, Texas and is the son of defendant W. H. Hunt.

4. Houston Bunker Hunt resides at 617 Edgefield, Garland, Texas and is the son of defendant N. B. Hunt.

5. Ellen Hunt Flowers resides at 3217 Colgate Avenue, Dallas, Texas and is the daughter of defendant N. B. Hunt.

6. Mary Hunt Huddleston resides at 6425 Westheimer, Houston, Texas and is the daughter of defendant N. B. Hunt.

7. Elizabeth Bunker Hunt resides at the University of Alabama, Tuscaloosa Campus, P. O. Box 6183, University of Alabama and is the daughter of defendant N. B. Hunt.

8. Hunt Holdings, Inc. is a closely held corporation controlled and dominated by defendant Douglas Hunt and is located at 2500 National Bank Building, Dallas Texas; which is also the business mailing address used by defendants for the transactions that are the subject of this complaint.

COUNT I

VIOLATIONS OF SECTION 4a OF THE ACT (7 U.S.C. § 6a) AND SECTION 150.4 OF THE REGULATIONS THEREUNDER (17 C.F.R. § 150.4)

9. Plaintiff hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 8, and further alleges:

10. Since at least January 17, 1977 and continuing to the present, defendants, directly and indirectly, by their combined positions of futures contracts established on the Board of Trade

of the City of Chicago, a designated contract market (7 U.S.C. § 5), and pursuant to an express or implied agreement or understanding, have exceeded, are exceeding, or will exceed the maximum net positions for soybean futures contracts fixed by the Commodity Futures Trading Commission under Section 4a of the Act (7 U.S.C. § 6a) and section 150.4 of the regulations thereunder (17 C.F.R. § 150.4).

11. By reason of the foregoing, defendants, Nelson Bunker Hunt, Houston Bunker Hunt, Douglas Hunt, W. H. Hunt, Elizabeth Bunker Hunt, Ellen Hunt Flowers, Mary Hunt Huddleston, and Hunt Holdings, Inc., singly and in concert, directly and indirectly, have violated, are violating and are about to violate and are aiding and abetting violations of Section 4a of the Act (7 U.S.C. § 6a) and section 150.4 of the regulations under the Act (17 C.F.R. § 150.4); the defendants unless restrained and enjoined will continue to engage in the acts or practices set forth in this complaint and in acts and practices of similar purport and object.

WHEREFORE, Plaintiff Commodity Futures Trading Commission respectfully demands that the Court enter:

A. A temporary restraining order, a preliminary injunction and final judgment of permanent injunction, restraining and enjoining each of the defendants, their officers, directors, subsidiaries, affiliates, agents, servants, employees, successors, attorneys and assigns, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, and each of them, from directly or indirectly, exceeding the maximum net position limits for commodity futures contracts fixed by the Commodity Futures Trading Commission under section 4a of the Commodity Exchange Act, as amended, 7 U.S.C. § 6a and section 150.4 of the regulations thereunder (17 C.F.R. §§ 150.4).

B. A mandatory order requiring defendants immediately to liquidate in an orderly manner all existing positions which

exceed the limits established by Section 4a of the Act (7 U.S.C. § 6a) and section 150.4 thereunder (17 C.F.R. 150.4).

C. An order directing defendants to disgorge all profits unlawfully obtained or to be obtained by reason of their violations of Section 4a of the Commodity Exchange Act, as amended (7 U.S.C. § 6a) and Section 150.4 thereunder (17 C.F.R. 150.4).

D. Such other further relief as the Court may deem necessary and proper under the circumstances.

Respectfully submitted,

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Dated: April 28, 1977

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING COMMISSION, *Plaintiff,* v. NELSON BUNKER HUNT, et al., *Defendants.*	No. 77 C 1489

MEMORANDUM OPINION AND ORDER

The plaintiff Commodity Futures Trading Commission (hereinafter, CFTC or Commission) is a federal agency entrusted by Congress with enforcement of the Commodity Exchange Act as amended (7 U.S.C.A.), and with the power to regulate commodity futures trading. Section 4a of the Act authorizes the Commission to set trading limits for the purpose of curbing excessive speculation and the Commission has set such limits. At all times relevant to this litigation, Commission Regulation 150.4(f) limited individual positions in soybean futures to 3,000,000 bushels. The limit applied not only to individuals but, in the words of the Regulation, "... to positions held by, and trading done by, two or more persons acting pursuant to an express or implied agreement or understanding, the same as if the positions were held by or the trading were done by, a single person".

It is plaintiff's contention that the defendants, six of them individuals related by blood or marriage and the seventh a corporation controlled by some of the six, have acted in concert, pursuant to an express or implied agreement or understanding, to acquire aggregate holdings in soybean futures greatly in excess of the three million bushel limit, and thereby have violated Regulation 150.4(f).

The filing of this complaint by the CFTC was accompanied by an application for a temporary restraining order seeking a court determination of excessive aggregate holdings and an order of divestiture. After preliminary hearings, this relief was denied, and after extensive discovery and further hearings, the court has now under advisement the prayer of plaintiff CFTC that defendants be found to have acquired holdings in soybeans in accord with a plan to circumvent and violate the speculative limit regulation (3,000,000 bushels), and that defendants be enjoined from continuing or future violation of said limit, that they divest themselves of excessive holdings, and disgorge profits thereby made.

The financial relationships and activities of the defendants relevant to soybean futures have been extensively spread of record, and the central dispute in the case is not the facts, but the inferences to be drawn from them. Plaintiffs point to close family ties, some common use of brokerage firms, and common record keeping and financing, as the major indicators of concerted action to evade individual position limits. Defendants argue that the facts do not justify the inferences of joint activity which plaintiffs draw therefrom.

Defendants have argued that the CFTC is ignobly motivated in the filing of this suit, and that the agency has singled out the Hunts for vindictive action. The court excluded much proferred evidence on this issue at the trial, and does not deem it relevant now. Whatever the motives of the CFTC, the issue is whether in fact the defendants acted in concert to evade and exceed position limits. Neither is the wisdom of the

3,000,000 bushel limit set by CFTC Reg. Sec. 150.4 before the court, nor the question of whether the Hunt holdings distorted the market or made possible a squeeze or manipulation of the market. Proof of a violation of Regulation 150.4 does not require proof of market effect. What is before the court, as has been phrased and rephrased so many times, is whether the defendants deliberately acted in concert to evade the individual position limits, and if so, what relief at this point in time would be meaningful.

As is evident from the findings of fact which accompany this memorandum, the court has reached the conclusion and made the finding that the named defendants have acted in concert pursuant to an implied agreement or understanding in the acquisition of soybean futures in excess of the maximum position limits permitted by Section 4(a) of the Commodity Exchange Act as amended (U.S.C. § 6a) and Regulation 150.4 thereunder (17 C.F.R. § 150.4). Because this was a civil rather than a criminal case, the standard of proof imposed upon the plaintiff agency in the establishment of this conclusion was that the conclusion stated above is more probably true than not true.

In the case of allegations of concerted action, it is difficult to determine the fair application of position limits or the circumstances which constitute their violation. People with the same investment philosophies will find themselves on the same side of the market. People who are friends and who discuss their investment philosophies with one another may find themselves getting in and out of the market at the same time, as a result of the application of their common philosophies to facts which, by mutual discussion, they have come to accept as true. Investors who rely on the advice of the same investment counsellor may find themselves getting into and out of commodity positions at the same time. None of these circumstances are necessary indicia of action in concert. All of these circumstances can be compatible with independent action.

But in the instant case, there has been more. There is evidence establishing that there was little or no exercise of independent judgment by the female members of the defendant group, and very little more by Houston Bunker Hunt and Douglas Herbert Hunt. Unique also to the Hunt situation was the virtual daily transmission to Nelson Bunker Hunt and William Herbert Hunt of information on the holdings of all other members of the family and of each other.

These are among the factors unique to this case which carry the court beyond the idea of parallel reaction to market forces without collusion, to the conclusion of concerted action which has been reached in the instant case.

Much of the activity described in the findings of fact reflects the normal and understandable desire of a father to place his children in potentially profitable investment situations, and to associate them with brokers whose advice he has found trustworthy. The easy availability of family funds to its various members may also reflect a commendable spirit of family unity. It is not necessary to impute sinister motives to Nelson Bunker Hunt and William Herbert Hunt in the creation of this highly family oriented situation. It is sufficient to conclude that the financial arrangements created by the two older Hunts for the benefit of the next generation of Hunts, created the opportunity for, and ultimately the fact of, an aggregation of positions in contravention of the regulation in issue here.

The relief to be framed based upon this conclusion is not readily apparent. The prayer for relief filed by the government seeks a declaration of violation of the regulations as stated above, and a permanent injunction prohibiting further violations. Since the regulation in question precisely and with clarity proscribes the conduct which the Hunts have been found to have engaged in, an injunction of this court could be no better phrased than to adopt the words of the regulation. It seems obvious that this is a meaningless exercise of the court's injunctive power. Since sanctions are provided by law for

violations of the regulation, the regulation stands as a proscription against the forbidden conduct more meaningful than any court injunction. Plaintiffs have not explained their failure to seek the imposition of sanctions. For whatever reason, the case proceeded in the context of a civil action with the lesser burden of proof thus required to be met. Plaintiffs are not obligated to explain to the court their choice of remedies or types of actions. A partial explanation, however, lies in the statement of the Commission that a declaration of a violation of the regulations by the Hunts would have a prophylactic effect, and that such an injunction would have a similar effect.

In any event, there is no basis for a finding that the violations are likely to continue. To the extent that the regulation itself has a prophylactic effect and to the further and greater extent that a declaration by this court of a violation thereof has an additional prophylactic effect, it is the view of the court that sufficient prophylaxis has been achieved. In the face of an existing regulation, with penal sanctions, proscribing the conduct complained of, no injunction of the court against this conduct in the future is necessary or desirable, and this prayer for relief is denied.

The plaintiff Commission further seeks an order of the court requiring the defendants to immediately liquidate in an orderly manner all existing positions which exceed the limits established by Section 4(a) of the Act. Since the proof heard by the court revolved principally around soybean futures contracts for May and July beans, it is obviously necessary to assume that the defendants hold no present position in these commodities. Whether the defendants are now in violation of Section 150.4 of the regulations is unknown to the court and unreached by the evidence which the court has before it for consideration. It is therefore impossible to enter a meaningful order requiring the defendants to liquidate their existing positions in excess of the limits established by the Act, and this prayer for relief must be denied.

Plaintiffs finally seek an order directing the defendants to disgorge all profits unlawfully obtained or to be obtained by reason of their violations of Section 4(a) of the Commodity Exchange Act. No statutory authority for this dramatic prayer for relief is cited. Further, the evidence of the shifting positions of the Hunts in the market, and the complexity of the evidence relevant to individual responsibility for exceeding position limits when the family holdings are aggregated, make it impossible to fashion a formula by which the profits to be disgorged by the individual defendants could be determined with any measure of equity.

This case is the first clear cut application of Section 4(a) of the Act and Section 150.4 of the regulations to family trading activity. While not relevant to a determination of whether defendants' conduct violated the regulation, it is appropriate to observe that the defendants *may* have operated in the good faith belief that their conduct was not illegal. The evidence in the case neither establishes this thesis nor is it inconsistent with it. The inconclusive proof in this area does militate against harsh and punitive results, especially in the face of the Commission's election to seek declaratory and equitable relief rather than the imposition of the criminal sanctions also available.

The prayer for an order of disgorgement of profits, therefore, is denied.

This leaves the matter in the incongruous posture that the court has declared a violation of the regulations by the defendants, but finds inappropriate any of the relief sought by the Commission. While the relief of an ordered divestiture would have been appropriate at an earlier date, the court did not deem the evidence sufficient at that time to order that relief. This period having passed, and now with all the evidence before it, the court finds itself unable, in the context of a civil and equitable case, to fashion appropriate relief. It is obvious that if the Hunts were in knowing and deliberate violation of

the position limits established by statute and defined by the regulations, that sanctions could have been sought and imposed. The Commission having not attempted this remedy now must be content with whatever prophylactic effect flows from a finding of fact by the court that the Hunts were, for a time, in violation of the regulation.

In summary plaintiff's prayer for a declaration that the defendants aggregated a position in soybean futures in excess of the 3,000,000 bushel limit prescribed by regulation is granted. Plaintiff's prayers for injunctive relief and an order to disgorge profits are denied.

The aggregate holdings of the defendants in soybean futures at the date of this order is unknown to the court. If it exceeds the 3,000,000 bushel limit, as of this date, orderly divestiture under court supervision to protect the market would seem to be appropriate. If the defendants' aggregate holdings do not exceed 3,000,000 bushels, no further exercise of this court's jurisdiction is necessary or desirable, and the order of this date will close the case.

Defendants Hunts and Hunt Holdings, Inc. responded to the plaintiff Commodity Futures Trading Commission with a counterclaim against the Commission and a third-party complaint against William Bagley, Chairman of the CFTC. The evidence does not support the several counterclaims and third-party claims asserted by the defendants. Much of the injunctive relief that they seek has been mooted by the passage of time, and the damages they pray for as the result of the conduct of the Commodity Futures Trading Commission or its members

are not supported by the evidence. Therefore, the several and various prayers for relief found in the counterclaim and third-party claims are denied.

ENTER:

FRANK J. MCGARR
UNITED STATES DISTRICT JUDGE

DATED: September 28, 1977

In the United States Court of Appeals For the Seventh Circuit

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Nos. 77-1672, 77-2086, 77-2087

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff-Appellant, Cross-Appellee,

v.

NELSON BUNKER HUNT, et al.,

Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-1489—Frank J. McGarr, *Judge.*

ARGUED APRIL 26, 1978—DECIDED JANUARY 8, 1979

Before SWYGERT, *Circuit Judge,* MARKEY, *Chief Judge,** and TONE, *Circuit Judge.*

SWYGERT, *Circuit Judge.* This case presents several issues arising out of a complaint brought by the Commodity Futures Exchange Commission, pursuant to the Commodity Exchange Act, against seven members of the Hunt family and an affiliated company. The complaint was instituted by the Commission on April 28, 1977 to compel the defendants to comply with limits

* The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

established by the Commission on the speculative position that any individual or group may have in soybean futures contracts. *See* Commodity Exchange Act, § 4a(1), 7 U.S.C. § 6a(1) (Supp. 1978); Rule 150.4, 17 C.F.R. § 150.4 (1977).

The Commission's complaint alleges that from at least January 17, 1977 and continuing to the commencement of the court action, two brothers, Nelson Bunker Hunt and William Herbert Hunt, five of their children, and a corporation they control, had been exceeding collectively the limit of three million bushels that had been set for soybean futures contracts. The complaint sought preliminary and permanent injunctions against future violations of these limits, the disgorgement of any profits the Hunts had obtained as a result of their unlawful conduct, and an order requiring the Hunts to liquidate all existing positions in soybean futures in excess of the speculative limits. Contemporaneous with the filing of the complaint, the Commission, pursuant to section 8a(6) of the Commodity Exchange Act, 7 U.S.C. § 12a(6) (1978), publicly disclosed the soybean trading activity and positions of the Hunts.

During the first week in May 1977 the Hunts filed an answer to the Commission's complaint in which they sought to enjoin the Commission from making any further disclosures of their soybean positions. The Hunts also asserted claims for money damages from the Commission and several of its employees for injuries incurred as a result of the Commission's publication of their trading positions. On May 17, 1977 the Hunts moved for a preliminary injunction prohibiting any further disclosure of their soybean trading activity. The district court, on May 19, 1977, enjoined the Commission from making public the Hunts' holdings, purchases, sales or positions in the futures market. The Commission appealed this order on May 20, 1977.

On September 28, 1977 the district court, after hearings on the Commission's motion for a preliminary injunction, issued a memorandum opinion accompanied

by findings of fact and law, and entered a judgment order. *Commodity Futures Trading Comm. v. Hunt*, No. 77-C-1489 (N.D. Ill., Sept. 28, 1977). The lower court concluded that the Hunts, acting in concert, had acquired soybean futures in excess of the three million bushel limit prescribed by regulation, thereby violating Rule 150.4 and section 4a(1) of the Commodity Exchange Act. The court, however, denied the Commission's motion for an order enjoining future violations of the limits and rejected the Commission's request for disgorgement of the Hunts' illegal profits. The lower court also rejected the counterclaim and third-party claims brought by the Hunts.

The Commission appealed from the lower court's decision, arguing that both the injunction and the ancillary relief of disgorgement should have been granted. The Hunts cross-appealed, seeking to overturn the district court's declaratory judgment that the Hunts had violated the speculative limit, and also challenging the validity of the regulation itself. The Hunts also challenged the dismissal of their counterclaim and third-party claims. The Commission's appeal and the Hunts' cross-appeal were consolidated in November 1977 with the Commission's earlier appeal of the lower court's injunction against publication of trading information regarding the Hunts.

I. *Validity of the Speculative Limit Regulation: Rule 150.4*

Section 4a(1) of the Commodity Exchange Act, 7 U.S.C. § 6a(1), authorizes the Commodity Futures Trading Commission to set commodity trading limits. Congress concluded that excessive speculation in commodity contracts for future delivery can cause adverse fluctuations in the price of a commodity, and authorized the Commission to restrict the positions held or trading done by any individual person or by certain groups of

people acting in concert.[1] Pursuant to this statutory authority, the Commodity Exchange Authority, the predecessor of the Commodity Futures Trading Commission, established trading limits on a variety of commodities, including soybeans. In 1951 the Authority set the soybean speculative position limit at one million bushels, 16 Fed. Reg. 8107 (Aug. 13, 1951). The Authority raised the limit to two million bushels in 1953, 18 Fed. Reg. 7230-31 (Nov. 14, 1953), and to three million bushels in 1971, 36 Fed. Reg. 1263 (June 6, 1971). This three million bushel position limit, Regula-

[1] Section 4a(1) of the Commodity Exchange Act, 7 U.S.C. § 6a(1), provides in pertinent part:

> Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months.

tion 150.4, 17 C.F.R. § 150.4 (1977),[2] was in effect at the time of the Hunt family soybean transactions.

The Hunts present multiple challenges to the soybean trading regulation, contending that there were procedural defects in its adoption and that it is an arbitrary and capricious exercise of administrative authority. The essence of the Hunts' attack on the validity of the regulation is their substantive contention that there is no connection between large scale speculation by individual traders and fluctuations in the soybean trading market.

The procedures used in the adoption of the speculative limits contemplated in the Commodity Exchange Act § 4a(1), 7 U.S.C. § 6a(2), must satisfy the rules of the

[2] Regulation 150.4, 17 C.F.R. § 150.4 (1977), states:

> The following limits on the amount of trading under contracts of sale of soybeans for future delivery on or subject to the rules of any contract market, which may be done by any person, are hereby proclaimed and fixed, to be in full force and effect on and after June 26, 1971:
>
> (a) Position limit. The limit on the maximum net long or net short position which any person may hold or control in soybeans on or subject to the rules of any one contract market is 3,000,000 bushels in any one future or in all futures combined.
>
> (b) Daily trading limit. The limit on the maximum amount of soybeans which any person may buy, and on the maximum amount which any person may sell, on or subject to the rules of any one contract market during any one business day is 3,000,000 bushels in any one future or in all futures combined.
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> * * * * * * *
>
> (e) Definition. As used in this part, the word "person" imports the plural or singular and includes individuals, associations, partnerships, corporations, and trusts.
>
> (f) Application of limits. The foregoing limits upon positions and upon daily trading shall be construed to apply, respectively, to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single individual.

Administrative Procedure Act regarding informal agency rulemaking. 5 U.S.C. § 353. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *United States v. Florida East Coast RR.*, 410 U.S. 224 (1973). These rules were followed by the Commodity Exchange Authority when it raised the soybean trading limit from two to three million bushels. The Authority published the proposed changes in the Federal Register, 36 Fed. Reg. 1340 (1971), and there was opportunity for written comment. In addition the Authority held a hearing on the proposal. The agency considered the material presented and ultimately amended Regulation 150.4 by raising the limit.[3]

The Hunts also claim that Regulation 150.4 is invalid and unenforceable because it represents an arbitrary and capricious decision by the Commodity Exchange Authority. They argue that the Authority failed to consider relevant factors in its decision to set the soybean trading limit at three million bushels. The substance of the Hunts' argument is that the Authority made no analysis of the relationship between the size of soybean price changes and the size of the change in the net positions of large traders. They argue that there is no direct relationship between these phenomena, and, therefore, the regulation limiting the positions and the trading of the large soybean traders is unreasonable.

The appropriate standard for reviewing agency decision-making pursuant to section 553 of the Administrative Procedure Act is described by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971):

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must

[3] The propriety of the procedures employed by the Commodity Exchange Authority in the 1971 amendment to Regulation 150.4 was upheld previously in *Economou v. Butz*, 370 F. Supp. 361 (S.D.N.Y. 1974).

> consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Id. at 416. *See also American Meat Inst. v. Environmental Protection Agency*, 526 F.2d 442, 452-53 (7th Cir. 1975). In assessing whether the Commodity Exchange Authority's three million bushel limit was an arbitrary or capricious means to achieve the congressionally articulated purpose of preventing excessive speculation, it must be remembered that the fact that "some other remedial provision might be preferable is irrelevant." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 371 (1973). In situations in which

> reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. *Northwestern Co. v. FPC*, 321 U.S. 119, 124 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943); *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 236 (1936).

Id. at 371-72.

The Hunts point to a variety of sources to substantiate their claim that the soybean position and trading limit is arbitrary and capricious. For the most part they allege that the Commodity Exchange Authority failed to consider the relevant factors in reaching its determination. The Hunts cite the Ham Study of 1971, the Imel Study of 1973, the testimony of their expert witness, Dr. T. A. Hieronymus, and even recent statements by a commissioner of the Commodities Futures Trading Commission questioning the three million bushel limit. Virtually all of the evidence the Hunts offered to challenge the three million bushel limit, however, was not part of the administrative record which formed the basis for the Commodity Exchange Authority's 1971 decision to raise

the limit to three million. The law is well settled that the administrative record already in existence—not some new record made initially in the reviewing court—should be the focus of judicial review. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 250 (2d Cir. 1977). In fact, most of the evidence cited by the Hunts is found in reports or testimony developed well after the promulgation of the 1971 trading limit. Last term the Supreme Court stated:

> As we have said in the past: "Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order litigation might demand rehearing as a matter of law because some new circumstances has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consumated in order that would not be subject to reopening." *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, 514-515 (1944). *See also United States v. Interstate Commerce Commission*, 396 U.S. 491, 521 (1970).

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 46 U.S.L.W. 4301, 4310 (1978). In *Vermont Yankee* the Court remonstrated a party objecting to an administrative regulation for cryptically referring to matters that "ought to be" considered in the administrative proceedings, and then judicially attacking the agency's determination for failing "to consider matters 'forcefully presented.'" *Id.* at 4309-10. And while an administrative agency must consider "the relevant factors" in its decisionmaking, *Citizens to Preserve Overton Park, supra*, at 416, we cannot permit this requirement to become a device by which parties can thwart enforcement of an established regulation by offering new evidence challenging the wisdom of the regulation in the context of the judicial enforcement proceeding. The reports and testimony

presented by the Hunts simply provide different opinions regarding the need for the three million bushel limit in the present soybean market. There is no indication that the Commodity Exchange Authority ignored any particular set of "relevant factors" in reaching its determination. *See Citizens to Preserve Overton Park, supra*, at 411-13.

The Hunts do rely on one report, the Callander Report, which was prepared by the Commodity Exchange Authority to guide its decision regarding soybean trading limits and, importantly, was made part of the administrative record of the agency's decision to raise the limit from two to three million bushels. The Hunts isolate a sampling of quotations from this report which would seem to suggest that the dangers of large scale commodity trading are minimal. The Callander Report at other points, however, does discuss the adverse effects large scale trading can have on the market. And the report concludes that the soybean limit should be raised from two to three million bushels. The statements in the report minimizing the dangers of large scale trading should be viewed in the context in which they were written. The Commodity Exchange Authority, operating under an express congressional mandate to formulate limits on trading in order to forestall the evils of large scale speculation, was deciding whether to raise its then existing limit on soybeans. Naturally the language in a report concluding that the limit should be raised would not constantly focus on the dangers of large scale trading; a case had to be made to justify raising the trading limits. Thus, it is not unusual that the administrative record supporting the June 1971 soybean trading regulation is not constantly focused on the relationship between large scale trading and adverse price fluctuations. Neither this fact, nor the possibility that reasonable men may disagree about the wisdom of the agency's conclusion, renders the regulation arbitrary or capricious. *See City of DesPlaines v. Metropolitan Sanitary Dist.*, 552 F.2d 736, 737 (7th Cir. 1977). There is ample evidence in the administrative record to support the regulation.

II. *Violation of the Speculative Limits*

The district court found that Nelson Bunker Hunt and William Herbert Hunt, five of their children, and a corporation they control had exceeded the speculative limit of three million bushels that had been established for soybean futures contracts by Rule 150.4, promulgated pursuant to section 4a(1) of the Commodity Exchange Act. 7 U.S.C. § 6a(1). The Hunts claim that the district court misinterpreted section 4a(1) in applying it to the Hunts' activities, and that there was no factual basis for a finding that the Hunts had violated the statute and its corollary regulation.

Section 4a(1) provides for the aggregation of commodity positions for purposes of determining whether the speculative limit has been exceeded, when one person "directly or indirectly" controls the trading of another, or when two persons are acting "pursuant to an express or implied agreement or understanding. . . ." 7 U.S.C. § 6a(1). Thus, even though two persons acting in concert might each individually have a commodity position below the limit, if their combined position exceeds the limit they have violated the statute. Further, contrary to the arguments advanced by the Hunts, there is nothing in either the statutory language or legislative history which suggests that intent—either to affect market prices or specific intent to exceed the speculative limits—is a necessary element of a violation of section 4a(1). In fact, the Senate Report to the 1968 amendments to the statute states that a speculative futures position exceeding the limit can constitute a statutory violation "regardless of how or when or for what purpose such position was created." 1968 U.S. Code Cong. & Ad. News 1673, 1677. A violation occurs simply when an individual or several individuals acting in concert exceed the commodity position limits set pursuant to the statute.

The Hunts contend that the evidence compiled in the district court is insufficient to prove a violation of the statute. In assessing the district court's findings, we must defer to the reasonable inferences of the trial court. Fed.R.Civ.P.52a. *See SEC v. Parklane*

Hosiery Co., 558 F.2d 1083, 1086 (2d Cir. 1977); *Markieweicz v. Greyhound Corp.*, 358 F.2d 26 (7th Cir.), *cert. denied*, 385 U.S. 828 (1966). Under this rule, the trial court's conclusion that the Hunts violated section 4a(1) by collectively exceeding the speculative limits of Rule 150.4 must be upheld.

A brief survey of the Hunt family's complicated soybean trading substantiates this conclusion. Nelson Bunker Hunt and William Herbert Hunt were the principal family figures in these transactions. They are brothers, and the chief officers of the Hunt Energy Corporation. In mid-1976 N. B. and W. H. Hunt entered the soybean market. By August 1 each brother consistently held a long position at the three million bushel limit, usually for the closest delivery month. Through a series of purchases—the date, timing, and size of which were virtually identical—each brother, by January 1977, held a three million bushel position in March 1977 soybeans. Over the next six weeks each of the Hunt brothers entered into eight transactions—on the same days, using the same broker, involving virtually identical quantities and prices. Throughout this time an employee of the Hunt Energy Corporation, Charles Mercer, prepared commodity position statements for the brothers reflecting their combined holdings and unrealized profits and losses.

On February 25, with both N. B. and W. H. Hunt at the personal position limit, N. B. Hunt ordered a purchase, through one of his brokers, of 750,000 bushels of May soybeans in the name of his son, Houston Hunt. On March 3 he ordered the purchase of 750,000 May bushels to be allocated equally among accounts he had opened on behalf of his three daughters. And, although the bank accounts of the various children lacked the funds to cover these purchases, the transactions were made possible by a short-term transfer of interest-free funds from their father's account. N. B. Hunt's children did not participate in these initial soybean transactions made in their names: they had nothing to do with opening the accounts, placing the first order, or arranging financing for their purchases. And once these family

members had entered the soybean market, their transactions were added to the composite report sent to N. B. Hunt.

A similar relationship existed between W. H. Hunt and his son, Douglas. On March 1 W. H. Hunt and his wife transferred their interests in Hunt Holdings, Inc. to their three sons. Less than a week later Douglas Hunt personally and through Hunt Holdings, whose trading he controlled, began purchasing July soybeans. These purchases were financed in part by money advanced by his father.

The overall involvement of the Hunt family in the soybean market also was increased by the spread trading—purchasing old crop contracts and selling contracts in new crop markets—of N. B. and W. H. Hunt. Some of N. B. Hunt's purchases in this period were financed by temporary advances from his brother. As of April 14, 1977 the Hunt family's collective position involved over twenty-three million bushels of old crop soybeans: over 10.8 million in May futures, 7.7 million in July futures, and 5.2 million in August futures. These collective figures, of course, put the Hunt family well over the speculative limits in soybeans set by Rule 150.4. And the evidence presented in the district court clearly indicates that the individual positions of the family members should be aggregated. Thus, the Hunt family soybean transactions constituted a violation of section 4a(1) of the Commodity Exchange Act, 7 U.S.C. § 6a(1).

III. *Lower Court's Refusal to Grant Injunction Against Hunts*

Pursuant to section 6c of the Commodity Exchange Act, 7 U.S.C. § 13a-1, the Commodity Futures Trading Commission is authorized to institute an action seeking injunctive relief whenever it appears that any person "has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order thereunder." Section 6c further provides that upon a proper showing, a permanent or temporary injunction or restraining order shall be granted by the district court without

bond. The discretion afforded the district court in deciding whether to issue such relief, while broad, *see United States v. W. T. Grant*, 345 U.S. 629, 633-34 (1953), is not completely unfettered. This court has noted that when Congress has integrated traditional modes of equitable relief into a statutory enforcement scheme, the court's equitable power should be exercised in harmony with the overall objectives of the legislation. *SEC v. Advance Growth Capital Corp.*, 470 F.2d 40, 53 (7th Cir. 1972). In that case we cautioned that

> . . . while trial courts should properly be accorded wide latitude in fashioning equitable remedies in cases of this type, it is the inescapable function of the appellate court to make sure that the fashioned remedy meets that criterion in accordance with the regulatory scheme and adequately serves the particularized needs of the case before the court. Although injunctive relief is never automatic upon the showing of a violation of the Act or regulations *(see Hecht Co. v. Bowles, supra)*, we should not hesitate to reverse an order denying such relief when it is evident that the trial court's discretion has not been exercised to effectuate the manifest objectives of the specific legislation involved.

Id.

Actions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence. Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations. *SEC v. Advance Growth Capital Corp., supra*, at 54; *Commodity Futures Trading Comm. v. British American Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977); *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975). While past misconduct does not lead necessarily to the conclusion that there is a likelihood of future misconduct, it is "highly suggestive of the likelihood of future violations." *SEC v. Management Dynamics, Inc., supra*, at 807. *See also Commodity Futures Trading Comm. v. British American Commodity Options Corp., supra*, at 142; *SEC v. Advance Growth Capital Corp., supra*, at 53. In drawing the inference from past violations that future violations may occur, the court

should look at the "totality of circumstances, and factors suggesting that the infraction might not have been an isolated occurrence are always relevant." *SEC v. Management Dynamics, Inc., supra*, at 807; *SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8 (2d Cir. 1977).

Other circuit decisions analyzing the problem whether or not to grant statutory injunctive relief after a violation has been proven have looked to a variety of factors to determine whether there is a reasonable likelihood of future misconduct. The fact that a violator has continued to maintain that his conduct was blameless has prompted several courts to look favorably on injunctive relief. *See SEC v. Shapiro*, 494 F.2d 1301, 1308 (2d Cir. 1974); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972). Similarly, when a defendant persists in its illegal activities "right up to the day of hearing in the district court . . . the likelihood of futures violations, if not restrained, is clear." *Commodity Futures Trading Comm. v. British American Commodity Options Corp., supra*, at 142 (citations omitted). More importantly, courts have analyzed the nature of the past misconduct and the violator's occupation or customary business activities to determine whether an injunction should be granted. When the violation has been founded on systematic wrongdoing, rather than an isolated occurrence, a court should be more willing to enjoin future misconduct. *SEC v. Manor Nursing Centers, Inc., supra*, at 1100. And when a defendant, because of his professional occupation or career interest, will be in a position in which future violations could be possible, relief is appropriate. *SEC v. Commonwealth Chemical Securities, Inc.*, No. 76-6175 (2d Cir., March 3, 1978).

In light of these standards, we conclude that the district court was incorrect in denying the injunctive relief sought by the Commission. It would be anomalous to conclude, as did the district court, that the carefully organized, large scale, and long term soybean trading activities of the Hunts constituted a violation of Section 4a(1) of the Commodity Exchange Act, but that relief under section 6c of the Act was inappropriate. Their misconduct was systematic and carefully preconceived.

Their soybean positions which were challenged by the Commission were maintained throughout the enforcement proceedings until the futures contracts came to their natural conclusion. Further, the Hunts consistently maintained that their conduct was blameless. And finally, the prominent place of the Hunt family in the commodity markets generally, suggests that it is not unlikely that they will be regular participants in the soybean markets in the future.[4] Thus, they will be in a position in which they are capable of committing future violations. Given the presence of all these factors, injunctive relief should have been granted.

IV. *Lower Court's Denial of Commission's Request for Disgorgement*

The original complaint of the Commission sought, in addition to injunctive relief, an order compelling the Hunts to disgorge all profits they obtained as a result of their illegal activities. Although no hearing on the merits of the propriety of this relief was held in the trial court, the request for an order of disgorgement was denied. The lower court's rejection of the Commission's prayer for disgorgement was precipitous, and we re-

[4] Virtually all of the planning and decisionmaking regarding the Hunts' trading activities was done by the brothers, W. H. and N. B. Hunt. And, prior to the transactions in question here, they were the only defendants significantly active in the commodities markets. In fact, N. B. Hunt's children had no knowledge or experience regarding commodity trading. It could be argued that an injunction is appropriate against only W. H. and N. B. Hunt and Hunt Holdings, Inc. However, the record in this case clearly indicates that the younger generation of the Hunt defendants possess the financial wherewithal to be substantial participants in the soybean market. It is not unlikely that they, either personally or with the advice of the Hunt family financial counselors, will be in a position to violate the regulation in the future. This fact, coupled with their complicity in the systematic wrongdoing which constituted the statutory violation in the instant case, warrants the imposition of injunctive relief.

mand the issue to the district court for reconsideration in light of the following observations.[5]

[5] The dissenting opinion argues, inter alia, that because the Commission never "lack[ed] opportunity to press for the disgorgement remedy it specifically sought . . . in its complaint" at the hearings held in the district court, the disgorgement issue should not be remanded for more complete consideration. *Infra* p. 40. The dissent fails to note, however, that the proceedings before the trial judge were on a renewed motion for a preliminary injunction, not permanent relief. These hearings focused only on the validity of the regulation, its application to the Hunts, and the appropriateness of an injunction against the Hunts restraining their future trading; neither plaintiff nor defendants addressed the disgorgement question in their trial motions or in their post-trial memoranda and proposed conclusions of law. Plaintiff's failure to raise the disgorgement issue in these hearings must be viewed against the background of the mutual effort of plaintiff, defendants, and the court to expedite resolution of the motion for preliminary relief. *See, e.g.*, Statement of Mr. Ryan, counsel for defendants, Transcript, July 5, 1977, p. 9; reprinted in Supplementary Appendix, *Hunt v. Commodity Futures Trading Commission*, No. 78-1055, p. 42sa.

The dissent also refers to a statement made by the Commission in the administrative proceeding which emphasizes the completeness of the district court hearings. *Infra*, p. 39. This statement, however, presumably was made in the context of the Commission's attempt to use the doctrine of collateral estoppel to establish only that the Hunts violated the commodity trading statute. Given that the Commission was seeking different relief in the administrative proceeding than it had in the district court, it is improbable that it would have made an argument based on principles of prior adjudication with respect to what forms of relief were appropriate. The Commission, moreover, "having recognized that the district court's findings had been made only for purposes of preliminary relief," Brief of Appellee, *Hunt v. Commodity Futures Trading Commission*, No. 78-1055, p. 10 n. 14, amended its motion for summary disposition of the administrative complaint (presumably the source for the quotation used by the dissent) and dropped its collateral estoppel contention, on February 15, 1978.

Given this background, it was not inappropriate for the Commission to postpone presentation of its evidence and arguments in support of its prayer for disgorgement until after the resolution of the motion for preliminary relief; more importantly, the Commission should not be precluded from offering these arguments to the district court on remand.

Disgorgement of illegally obtained profits has been ordered in a number of Securities Exchange Commission judicial enforcement proceedings. *See, e.g., SEC v. Commonwealth Chemical Securities, Inc.*, No. 76-6175 (2d Cir., March 3, 1978); *SEC v. Shapiro*, 494 F.2d 1301 (2d Cir. 1974); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971). In these cases, disgorgement was ordered despite the fact that there was no specific, express authority for this remedy in the Securities Exchange Act. Further, the Second Circuit in these cases explicitly rejected the objection that disgorgement is a penalizing rather than a remedial, equitable device, correctly reasoning that disgorgement does not penalize, but merely deprives wrongdoers of ill-gotten gains. *See, e.g., SEC v. Texas Gulf Sulphur Co., supra*, at 1308; *SEC v. Shapiro, supra*, at 1309.

The question whether disgorgement is an appropriate form of ancillary relief in the Commodity Exchange Act context, as in the Securities Exchange Act setting, is, however, a closer one. Both sections 21(e) and 27 of the Securities Exchange Act discuss remedies for the enforcement of the norms of the Act. Section 21(e) only authorizes the Securities Exchange Commission to seek injunctive relief. Section 27, however, grants the district court general equitable powers to enforce the Act. The leading case authorizing the disgorgement remedy rested its conclusion, in part, on the general remedial powers possessed by the district court pursuant to section 27. *SEC v. Texas Gulf Sulphur Co., supra*, at 1307. Section 21(e) was relevant to that court's reasoning only insofar as the court rejected the objection that section 21(e) limits the type of remedy the Securities Exchange Commission can pursue to injunctions.

Section 6c of the Commodity Exchange Act tracks the injunction language of section 21(e), but adds the broadening language that the Commodity Futures Trading Commission may bring an action in the district court "to enforce compliance with this chapter, or any rule, regulation or order thereunder . . . ." 7 U.S.C. § 13a-1. There is, however, no provision in the Commodity Exchange Act comparable to the express grant of equitable authority found in section 27 of the Securities Exchange Act. Thus, the principal statutory authority the Second Circuit has relied on in approving disgorgement in the Securities Exchange Act context is absent from the Commodity Exchange Act.

In the *Texas Gulf Sulphur* decision, however, the court referred to cases in other contexts in which the Supreme Court has upheld

> the power of the Government without specific statutory authority to seek restitution, and has upheld the lower courts in granting restitution, as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief. *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *United States v. Moore*, 340 U.S. 616, 71 S.Ct. 524, 95 L.Ed. 582 (1951); *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed.2d (1946).

Id.

And in these cases, there is no explicit statutory expression, like section 27, of the court's equitable enforcement powers; the authority to grant disgorgement is found in the traditional equity powers of a court. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974).

In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), for example, the Supreme Court dealt with an action brought by the Price Administrator pursuant to the Emergency Price Control Act to enjoin the collection of excessive rents and to compel reimbursement of money collected by landlords as a result of past violations. Assessing language describing the authority of the district court which parallels the language of section 6c of the Commodity Exchange Act,[6] the Court stated:

[6] The relevant statutory provision, section 205(a) of the Emergency Price Control Act of 1942, states:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make

(Footnote continued on following page)

> . . . the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances.
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> * * *
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> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398. *See also Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). In *Porter*, the Court reasoned that an order for restitution could be justified either as an adjunct to an injunction decree or as "an order appropriate and necessary to enforce compliance with the Act." 328 U.S. at 399-400.

The Commodity Exchange Act contains no provision similar to section 27 of the Securities Exchange Act, but neither does it have any provision restricting the equitable power of the district court. *Porter* and *Mitchell*

[6] *continued*
application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond. 56 Stat. 23, 33.

indicate that the latter fact is a sufficient basis for concluding that a district court possesses the authority to order restitution pursuant to the Commodity Exchange Act. Further, as the Second Circuit noted in the Securities Exchange Act context, to allow a violator to retain the profits from his violations would frustrate the purposes of the regulatory scheme. *See SEC v. Texas Gulf Sulphur Co., supra*, at 1308; *SEC v. Manor Nursing Centers, Inc., supra*, at 1104. Thus we conclude that a district court may compel a violator of regulations promulgated under the trading limit provisions of the Commodity Exchange Act to disgorge his illegally obtained profits.

This conclusion, however, does not complete our inquiry. Both the district court's memorandum opinion and the Hunts' briefs refer to the complex evidentiary problems involved in the attempt to isolate the profits achieved by the Hunt family members on the basis of their soybean trading *in excess* of the speculative limits. Further, even if it can be determined with some precision what amounts should be disgorged, the Commodity Futures Trading Commission has made no suggestion about what a court would do with the disgorged funds. This is a particularly vexing problem given the difficulty of determining injured parties in a large, complex system of exchange like the soybean market. Therefore, we remand this issue to the district court to give the Commission the opportunity to present arguments and evidence regarding the feasibility of this form of remedy in the instant case.

V. *Lower Court's Authority to Enjoin Publication of Hunts' Trading Positions*

On May 19, 1977 the district court entered an order preliminarily enjoining the Commodity Futures Trading Commission, in the absence of prior court approval, from making public the holdings, purchases, positions, or sales of the Hunts in the commodity futures market. The district court vacated this order on September 22, 1977. The Commodity Futures Trading Commission appealed the imposition of this order. We find that in light of the

district court's removal of the injunction against publicity, the issue is moot.

Under Article III of the Constitution, the exercise of federal judicial power depends on the existence of a justiciable case or controversy; federal courts do not have jurisdiction to review moot cases. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3 (1964). In the instant case, the alleged injury suffered by the Commission because of the imposition of the injunction is no longer extant; the district court's order has expired. Further, this is not a case in which, because the issue is "capable of repetition, yet evading review," we should hold that the issue is not moot. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). Unlike the responding parties in these cases, *see also, e.g., Nader v. Volpe*, 475 F.2d 916 (D.C.Cir. 1973), the Hunts, especially given the imposition of an injunction supervising their trading, are unlikely to be involved in future litigation in which they seek to enjoin the Commission publicity about their commodity trading. They do not have any significant interest in the question whether, in the future, a district court can impose a publicity injunction upon the Commodity Futures Trading Commission; thus, they lack the personal interest which stimulates adverseness. *See generally O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974). There is little likelihood that the Hunts will seek an injunction like this one in the future. Without such a likelihood of recurrence, the Southern Pacific Terminal doctrine does not apply and this controversy must be considered moot. *See SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972).

VI. *Dismissal of Counterclaims and Third-Party Claims*

The Hunts have cross-appealed from that portion of the district court's order which denied their counterclaims against the Commodity Futures Trading Commission and their third-party claims against Commissioner Bagley and unknown employees of the Commission for

damages. These claims were based on the Commission's allegedly wrongful disclosure of the Hunt's soybean trading positions. The Commission published this information pursuant to section 8a(6) of the Commodity Exchange Act, 7 U.S.C. § 12a(6) (1976) which authorizes the Commission to publish "the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Commission disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers." *Id.* We sustain the result reached in the lower court.

Without explicit authority, or unless the agency is the offspring of a suable entity, an agency of the federal government cannot be sued *eo nomine* for damages. *Blackman v. Guerre*, 342 U.S. 512 (1952). *See also Bell v. Groark*, 371 F.2d 202 (7th Cir. 1966). Congress did not write such authority into the Commodity Exchange Act. Thus, the Hunts' counterclaim against the Commodity Futures Trading Commission as an entity cannot be maintained.

The Hunts' third-party claims against Bagley and the unnamed employees of the Commission also fail. First, these parties were impleaded improperly by the Hunts. Fed.R.Civ.P. 14(a) authorizes the impleader of a person only when that person "is or may be liable to [the defendant] for all or part of the plaintiff's claim against him." Clearly the Commission employees who are the subject of the Hunts' third-party complaint are not liable for the Hunts' violation of the soybean trading limits. And this was the only claim brought by the plaintiff-Commission against the Hunts. Thus, Bagley and the unknown employees of the Commission cannot be brought before the court pursuant to Fed.R.Civ.P. 14(a).

More fundamentally, the Commission actions which are the substance of the Hunts' claims—publishing the Hunt family's positions in the soybean futures market—were clearly within the scope of the official duties of Commissioner Bagley and the other Commission em-employees. *See* Commodity Exchange Act § 8a(6), 7

U.S.C. § 12a(6) (1976). Thus, the third-party defendants enjoy immunity from the Hunts' damage claims. *Butz v. Economou*, 46 U.S.L.W. 4952 (1978); *Barr v. Mateo*, 360 U.S. 564 (1959); *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst.*, 566 F.2d 289 (D.C.Cir. 1977) (*en banc*).

Accordingly, we remand this case for further proceedings not inconsistent with this opinion.

MARKEY, *Chief Judge*, concurring and dissenting.

I concur in upholding Regulation 150.4, in affirming the declaratory judgment of a violation,[1] in holding moot the injunction-against-publication issue, and in affirming dismissal of the counterclaim and third-party claims.

I dissent, most respectfully, from reversal of the injunction denial, because it unjustifiably diminishes, if it does not disregard, the deference due the district judge's discretion.

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[1] The "violation" is technical. The Commission conceded that defendants' trading had no effect on, and represented no threat to, the market. The evidence from which an "implied agreement or understanding" could be inferred is feeble. No intent to manipulate, or to aggregate, no "sinister" intent of any kind, was charged or shown. Defendants point to evidence of independent trading and the absence of an overall pattern. The district court, however, declared a violation on the basis of some instances reflecting non-exercise of independent judgment and the use of centralized reports. The question is not without doubt, but I cannot say that the district court's declaration was clearly erroneous.

I would add a dissent to the majority's discussion of what constitutes a violation. Even if, as the majority impermissibly does, one substitutes "acting in concert" for "acting pursuant to an * * * implied agreement or understanding," the need for inferring *some* scienter remains. Persons cannot act "in concert" without knowing it. To say that "nothing" in the act requires intent is to ignore the statute's own words "agreement or understanding." Even if the majority's phrase be substituted, it is difficult to see how persons may be held to have acted "in concert" with no evidence of any intent to act in concert. Both the district court and the majority here, I respectfully submit, skate dangerously close to the thin ice, whereat a *post-hoc* aggregation equals violation. Absent *some* "understanding" the positions of any two or more traders could be "aggregated" and a "violation" be thereby found. Though the evidence here might well support a finding of no "agreement or understanding" of any kind, we do not sit *de novo*, and I agree with the majority in its deference to inferences drawn by the trial court. Fed. R. Civ. P. 52(a).

I dissent, with equal respect, from remand of the disgorgement issue, because it wastefully compels a busy district judge to attempt the impossible.[2]

I. *Refusal to Grant Injunction*

I would affirm the district court's refusal of an injunction.

The statute requires that the Commission make "a proper showing," and that showing must include "some reasonable likelihood of future violations."

The district court, who heard and observed the witnesses, who entered a carefully considered and reasoned Memorandum Opinion, and who supplied voluminous Findings and Conclusions, stated: "A 'proper showing' for preliminary injunctive relief under Section 6c of the Act requires the Commission to establish a *prima facie* case that there is a likelihood of *future* violations. [emphasis the court's] *No* such showing has been made." (emphasis added)

To order that a district court enjoin a party, when the other party has not made to that court even a *prima facie* showing of future violations, is to render merely platitudinous the majority's references to the district court's broad "discretion," and the concept that "injunctive relief is never automatic."

The district court also found "no basis for a finding that the violations are likely to continue." Nowhere does the record reflect a basis for our declaring that finding clearly erroneous.

Importantly, the denial we here review is the *second* in this case. On May 6, 1977 the district court denied a preliminary injunction because the Commission had

[2] The Commission briefs on appeal made no argument in support of its request below for liquidation of excess holdings, perhaps because, as the district court stated in its Memorandum Opinion and Order of October 11, 1977, the aggregate holdings of the defendants "do not exceed the three million bushel limit."

failed to make a "proper showing" therefor, even if defendants' positions were aggregated, (*i.e.*, if there were a violation). The Commission appealed and *this court*, after briefs and argument, *affirmed* the refusal to grant the injunction, in an unpublished order of May 12, 1977. Nothing in the subsequent record adds any fact indicating a likelihood of future violation, or removes that affirmance from its standing as the law of the case.

In all events, this court should not reverse itself without at least some effort to distinguish its contradictory positions on the same facts.

The majority opinion lists various generalized bases on which an injunction *can* be rested, nowhere indicating, however, wherein the district judge *abused* his discretion in *this* case. Whatever may have been the relationship of the views expressed in the majority's cited cases to the facts in those cases (discussed below), no adequate foundation for application of those views appears in the record of this case.

If past misconduct be so suggestive of future violations as to require reversal, whence a reference to *any* "discretion" of a district judge? If past misconduct does not "necessarily" lead to a conclusion that future violations are likely, how can an appellate court rely on it to reverse *this* district judge's determination that it did not?

I find unhelpful a reference to "factors suggesting that the infraction might not have been an isolated occurrence," and "systematic wrongdoing," when no such "factors" are present or cited here. That reference is particularly inapt in this case, which the district court described as involving "the first clear cut application" of Rule 150.4 to family trading activity.[3]

[3] In *Kent v. Hardin*, 425 F.2d 1936 (5th Cir. 1970), there was control by the father-in-law, and a letter expressing agreement to trade identically. Neither control nor express agreement is even alleged here, and neither was shown or inferrable.

(Footnote continued on following page)

That a defendant maintains his innocence, and refuses to cease blameless-in-his-eyes activities until a court declares him wrong, can hardly warrant an appellate court in substituting its judgment for every exercise of a district judge's discretion to deny an injunction, and in thus destroying all vestige of discretion and all right to an honest belief in one's own innocence sufficient to warrant a fight.

The facts must control. An honest belief in one's own innocence is one thing. A knowingly false claim of innocence is quite another. In this "first clear cut" case, defendants submitted extensive evidence indicating differences in trading patterns and lack of centralized trading control. All trades were fully reported on time to the Commission. Intent to aggregate or to manipulate was not shown and was not charged. Nothing whatever of record would justify a conclusion that defendants' assertion of innocence here was disingenuous, and the majority cites no basis for any such conclusion.

Similarly, it will not do to found a reversal here on the expectation that defendants will continue to trade. Whatever the facts may have warranted in *SEC v. Commonwealth Chemical Securities*, 574 F.2d 90 (2d Cir. 1978), (see *infra*) the rule is not whether future violations "could be possible," but whether they are *likely*.

The majority labels the district judge's exercise of his discretion here as "anomalous," on the ground that a "violation" having been found, an injunction should have been granted, again making injunctions automatic and effectively removing all discretion. In total contradistinction to the notion that a declaration of violation renders "anomalous" the denial of an injunction here, that declaration, sought by the Commission as a prophylactic, is, as the district court stated, a fully ade-

[3] *continued*
United States v. Cohen, 448 F.2d 1224 (2nd Cir. 1971), *cert. denied*, 405 U.S. 954 (1972), was a criminal prosecution, in which a father totally controlled all trading, holding daily family meetings to instruct on strategy, placing and financing all trades personally, forging his sons' names, and keeping all funds in his own account. None of those acts occurred here.

quate *substitute* for an injunction in this case. *See Perez v. Ledesma*, 401 U.S. 82, 111-112 (1971) (concurring opinion); 6A J. Moore § 57.05, 7 J. Moore § 65.18(2) n.4.

Nowhere showing the district judge's action to have been an *abuse* of discretion, but merely labeling it "incorrect," the majority opinion begins by calling defendants' conduct "carefully organized, large scale, and long term," and "systematic and preconceived." The district court did not so describe defendants' activities.[4] The nature of commodity trading futures contracts, the effect on the market of sudden liquidation, and an honest belief in blamelessness, fully justified carrying out the contracts under attack.[5] As above indicated, a defendant should not be penalized for an honest belief in his own innocence. The likelihood that defendants may participate is not the same as a likelihood that they will violate. Nor is capability for violation equatable with likelihood of violation; many are capable. That some

[4] Use of pejoratives like "secret" or "clandestine" is precluded, because *defendants themselves* reported *all* of their trading activities to the Commission, and it was *that* information which led to the Commission's complaint.
The pejoratives employed by the majority are not supported in the record. Far from "carefully organized," some offspring sold when fathers bought, some holdings never approached the limit, and the centralized reports were after-the-fact reports. Far from "large scale," defendants' total net long positions in soybeans was less than 2% of the total contracts. Far from "long term" the entire period involved is January-April 1977. There is no evidence whatever justifying "systematic" or "preconceived."

[5] By letter dated April 14, 1977, the Commission notified defendants that their trading activities were aggregatable. At that time, the fathers, W. H. Hunt and N. B. Hunt, had each been at limit for eight months. The Commission filed its complaint in the district court on April 28, 1977. Trial began immediately. The majority's reference to "persistence" up to the day of trial seems at best inappropriate under those circumstances.
Moreover, the Commission's rush to the press, with disclosure of defendants' positions, and the consequent effect thereof on the market, virtually required completion of the existing contracts, and that completion was carried out *with permission of the district judge* who lifted a restraining order for that very purpose.

offspring had not previously traded is equally meaningless; everyone who trades must start. The explication of the basis for reversing the district judge's exercise of discretion here would thus appear to be a gathering of zeros.

Further, the supplanting of the district court's discretion is occurring here: (1) without mention of the district court's carefully spelled-out reasoning, and without an explanation of why that reasoning is wrong; (2) without reference to or distinguishing of this court's earlier affirmance on the same facts; (3) without mention of defendants' having disposed (as found in the district court's order of October 11, 1977) of all their holdings above an aggregated total of 3,000,000 bushels; (4) without recognition of the immediate availability to the Commission of full information on all of defendants' future trades; (5) without guidance as to how defendants can be injunctively held to a total of 3,000,000 bushels, as the Commission insists, without centralized reports, one of the two bases for finding a violation here; and (6) without explanation of why an injunction is necessary to effectuate the manifest objectives of the legislation involved.

Still further, the authorities cited by the majority do not support reversal of the present injunction denial. They point toward affirmance. Of the eight cases cited, only two involved a reversal of a district judge's injunction denial, and the decision in those two cases rested on facts not present here.

Indeed, *United States v. W.T. Grant Co.*, 345 U.S. 629, 633-36 (1953) virtually impels affirmance of the district court in the present case:

> The facts relied upon by the Government to show an abuse of discretion in this case are these: Hancock's three interlocking directorates viewed as three distinct violations, his failure to terminate them until after suit was filed despite five years of administrative attempts to persuade him of their illegality, his express refusal to concede that the interlocks in question were illegal under the statute and his failure to promise not to commit similar violations in the future.

> Were we sitting as a trial court, this showing might be persuasive. But the Government must demonstrate that there was no reasonable basis for the District Judge's decision.[6] In this we think it fails. An individual proclivity to violate the statute need not be inferred from the fact that three violations where charged, particularly since it is only recently that the Government has attempted systematic enforcement of § 8. The District Court was not dealing with a defendant who follows one adjudicated violation with others. The only material before the District Judge on the supposed five years of administrative persuasion could easily support an inference that during that time the defendant and the Department of Justice were each trying to determine the legality of his directorships. The Government's remedy under the statute was plain. Postponement of suit indicates doubt on the prosecutor's part as much as intransigence on the defendant's. How much contrition should be expected of a defendant is hard for us to say. This surely is a question better addressed to the discretion of the trial court. The same can be said of the limited disclaimer of future intent.
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> Essentially, the Government's claim is that it was deprived of a trial on the relief issue. But at no time was objection raised to the procedure by which the case was handled. * * * As to the prayer that the defendants be enjoined from any future violations of § 8, the complaint alleged no future violations other than those specifically charged. In these circumstances, the District Judge could decide that there was no significant threat to future violation and that there was no factual dispute about the existence of such a threat.
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> We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive

[6] Cf. *United States v. United States Gypsum Co.*, 340 U.S. 76, 89 (1950), on review of particular antitrust decree provisions.

> relief. Moreover, the court stated its dismissals "would not be a bar to a new suit in case possible violations arise in the future."

The precedential and controlling impact of *Grant* is apparent. The bases for the charge (aggregation of family soybean contracts—viewing interlocking directorates as three violations) and the rejected reasons for reversing (continuation of existing contracts—failure to terminate directorships: maintenance of innocence—refusal to concede illegality) are virtually identical. As in *Grant*, the government here failed to demonstrate absence of reasonable basis for the district judge's decision. The "recently" attempted enforcement of § 8 in *Grant* parallels the "first clear cut application" of Regulation 150.4 in this case. The present defendants are not even accused of committing an "adjudicated violation." The amount of contrition to be expected of defendants here is just as "surely * * * better addressed to the discretion of the trial court." Here, as in *Grant*, the government raised no objection to the procedure below and the complaint alleged no future violations other than those charged.

In *SEC v. Management Dynamics, Inc.*, 515 F.2d 801 (2d Cir. 1975), after pointing out that "* * * illegal activity, without more, does not automatically justify the issuance of an injunction," *id.* at 807, the court affirmed issuance of an injunction against Levy and vacated that against Hodge, the difference being a clear showing of a "likelihood that the wrong will be repeated" in the one instance, *id.* at 807, and its absence, *id.* at 814, in the second.

In *SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8 (2d Cir. 1977), the court *affirmed* the *denial* of an injunction, because the defendant's transgression was an isolated occurrence. In so doing, the court said, *id.* at 18-19:

> It is well settled that the Commission cannot obtain relief without positive proof of a reasonable likelihood that past wrongdoing will recur. [Citing cases.] * * * The SEC must show a "cognizable risk of future violation, something 'more than the mere possibility which serves to keep the case alive.'"

> [Citing cases.] * * * As the party challenging the district judge's exercise of discretion, the SEC can prevail only if there was no reasonable basis for his decision. [Citing cases.] In this case, the SEC has utterly failed to make such a showing.
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> * * * This court is not inclined to substitute its judgment for that of the experienced trial judge who heard the witnesses and had the "opportunity by observation better to prophecy future conduct than one can on this printed record." *Chris-Craft Industries v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1972).[7]

In *SEC v. Shapiro*, 494 F.2d 1301 (2d Cir. 1974), the court *affirmed* the imposition of an injunction against a stock market professional who used corporate insider information on seven stock purchases within six weeks, stating "* * * we do not review the decision of the district court de novo." *Id.* at 1308.

Again, in *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972), the court *affirmed* the issuance of an injunction against defendants who had engaged in repeated acts of *fraud* described by the district judge as "willful, blatant, and often completely outrageous," *id.* at 1101, and the conflict and inconsistency of defendants' testimony justified the district judge's doubts about assurances of no future violations.

In *SEC v. Commonwealth Chemical Securities, Inc.*, *supra*, the court affirmed the issuance of an injunction against defendants guilty of "repeated and persistent," 574 F.2d at 100, acts of *fraud*, and vacated injunctions against other defendants, saying "we see no likelihood of repetition," *id.* at 100, adding: "It would make a mockery of language such as that we have recently used in *Bausch & Lomb* [*supra*] to hold that the SEC had met its burden of showing a likelihood of recurrence

[7] Compare the present case, where the violation is an isolated "first," the Commission made *no* showing, and the proposal is to substitute the panel's judgment for that of a most experienced trial judge.

with respect to these two minor participants concerning whom there was no evidence of prior or subsequent violations." *Id.* at 100. The court also said, "It is fair to say that the current judicial attitude toward the issuance of injunctions on the basis of past violations at the SEC's request has become more circumspect than in earlier days." (At 99) After pointing out that injunctions can have grave consequences, the court said, "Our recent decisions have emphasized, perhaps more than older ones, the need for the SEC to go beyond the mere facts of past violations and demonstrate a realistic likelihood of recurrence. [Citing cases.]"[8]

One such "older" case, *SEC v. Advance Growth Capital Corp.*, 470 F.2d 40 (2d Cir. 1972), is one of the two cited in which an injunction denial was reversed. Defendants knowingly made false statements and omissions in reports and breached fiduciary relationships. The court said, "These were not mere 'technical' violations of regulatory legislation, but continual and extensive violations of provisions which lie at the very heart of the remedial statute." *Id.* at 53-54. In our present case: there are no false statements, omissions, or fiduciary breaches; the violation *is* of "regulatory legislation;" and there is no charge or evidence of market manipulation, which "lies at the very heart of the remedial statute."

Commodity Futures Trading Commission v. British American Commodity Options Corp., 560 F.2d 135 (2d Cir. 1977), is the other case involving reversal of an injunction denial, and the only cited case involving the present Commission. There the violation was of a statutory requirement for registration, 7 U.S.C. § 6m, entirely different from the regulation here involved. There, also, the decisional matrix was comprised of facts entirely distinct from those now before us. Defendant acted as a commodity trading advisor without being registered. The court, like that in *Advance Growth*, noted the relationship to the statute, describing registra-

[8] Compare our present case, where the district judge found that the Commission made *no* showing, not even *prima facie*, of *any* likelihood, much less a "realistic likelihood," of recurrence.

tion as "the kingpin in this statutory machinery." 560 F.2d at 139. The Commission filed an administrative complaint, citing the prior SEC disbarment of defendant's president and sole stockholder, John Forma, from the securities markets, and current *defrauding* by defendant of commodity option buyers, as grounds for denying defendant a registration. When defendant continued its activities for three months thereafter without registration, the Commission sued in court for only a preliminary injunction.[9] The district court denied an injunction in the belief that a likelihood of some fraud or misconduct related to John Forma's securities law violations must be shown. Pointing out that the injunction merely precluded use of the mails without registration, and that fraud and misconduct of John Forma were not required when the statute merely required registration of defendant, the court held the Commission *had* established a *prima facie* case that *unregistered* activities were likely of repetition, stating, *id.* at 144:

> We do not hold here that the district court must become a rubber stamp and issue an injunction whenever the Commission applies for one. We hold simply that once the Commission has made a prima facie showing that violations of the registration provisions of the Act have occurred and are likely of repetition and that the Commission has a tenable basis for commencing administrative proceedings to inquire into an applicant's fitness, an injunction must issue.
>
> We share the district court's concern and unfavorable view of the Commission's delay at the administrative level, and appreciate the difficulties confronting it in undertaking to resolve the elusive and irrelevant issues raised at the hearing. Nevertheless, we feel that the Commission, albeit

[9] Unlike the situation here, where the Commission filed no administrative complaint prior to suit, but sought a full panoply of relief from the courts, filing an administrative complaint only *after* the final order of the district court and on the same facts and allegations then pending on appeal before this court. See our decision of even date in appeal no. 78-1055 (Hunt II).

> confusingly, made out a "proper showing" for relief under § 13a-1, and the injunction should, therefore, have been issued.

The issue here, as I view it, is not whether the district judge *could* have granted an injunction, but whether he *had* to; not whether he "incorrectly" exercised his discretion, but whether he *abused* it.

In the total absence of any showing of a likelihood of future violations, the district judge would have abused his discretion if he *had* granted the injunction.

The majority opinion reflects broad statements which, if all were applicable here, and if we were considering the matter de novo, might arguably support the grant of an injunction. But we do not sit de novo. There has been a trial, with full opportunity for the Commission to make its case for an injunction. The district judge heard and observed the demeanor of all the witnesses. Where, as here, an executive agency is found by the district court to have made "*no* showing" (emphasis added), not even prima facie, that future violations are likely, it ill behooves an appellate court to create that showing. In all events, I respectfully suggest that a showing, not merely prima facie but so strong as to require reversal, cannot be constructed on innuendo and speculation drawn from the present printed record.

In respect for the district judge's carefully considered exercise of his discretion, in consideration of his having heard and observed all the witnesses, in the light of the Commission's total failure on appeal to show that the district judge had no reasonable basis for his exercise of discretion in this case, and, above all else, in recognition of his effectively unchallenged finding that the Commission made no showing before him that future violations were likely, as required by law, I would affirm the district judge's denial of an injunction.

II. *Lower Court's Denial of Commission's Request for Disgorgement*

Concerning the Commission's request for an order directing disgorgement, the district court said this:

> No statutory authority for this dramatic prayer for relief is cited. Further, the evidence of the shifting positions of the Hunts in the market, and the complexity of the evidence relevant to individual responsibility for exceeding position limits when the family holdings are aggregated, make it *impossible* to fashion a formula by which the profits to be disgorged by the individual defendants could be determined with any measure of equity. [Emphasis added.]

On appeal, the Commission makes no effort to counter the district judge's finding that an equitable disgorgement formula was impossible. Its only reference thereto is in a footnote, alleging that denial of that remedy was premature and that it had had "no opportunity" to "present [unspecified] information." As discussed below, that statement is at best disingenuous.

The majority opinion chooses to substitute for the district court's equitably "*impossible*" evaluation its description of "merely complex evidentiary problems" in isolating profits and the merely "vexing" problem of determining injured parties.

A short litany of market facts demonstrates the correctness of the district court's "impossible" evaluation and the inaccuracy of the attempted downgrading to merely "complex-vexing:"

(1) Defendants' activities concededly had no effect on the price of soybeans.
(2) Increase or decrease in position value is settled daily.
(3) Profitability of "naked" positions differs from profitability (if any) of "spread" positions.
(4) Futures contracts are fungible, i.e., it is impossible to determine which contracts are being sold when less than the entire position is sold.

(5) A trader's account reflects only net increases or decreases in all commodities combined where a trader trades in more than one commodity.

(6) Which parts of a long position are "spread" against a shorter position is impossible to determine.

(7) A commodity future contract fluctuates almost daily in price and traders can take any profit out of the accounts immediately, making tracing impossible.

(8) Delivery wipes out all profits made in a position.

(9) Only the profits on excess holdings are sought to be disgorged, adding to the impossibility of tracing, valuation, cross-account segregation and contract identity described above.

(10) Here there are eight defendants trading in various commodity futures at various times, "trading the crush," trading the "reverse crush," going long, speading, "rolling," "covering," going short, and "passing through," all relating to commodities that don't yet exist and are likely never to be delivered to any trader holding a contract during the period (January-April) involved in the complaint.

Even if disgorgement were appropriate here (and, I submit *infra*, it is not) the job of tracing, identification and valuation, would embroil the district court in evidentiary problems of complexity unlimited and of chaos unending. Even then, as the district court so clearly stated, the working out of an *equitable* formula would be *impossible*.

Appellate courts should not, I think, order a district court to attempt the achievement of what the district court sees, and what upon short reflection all can see, from the outset to be impossible.[10]

[10] The majority opinion defers to the inference of a violation drawn by the district court, but disregards the same court's unequivocal statement (not merely an inference) that devising an equitable formula is impossible.

Moreover, we should not order an attempt to do a useless thing. Presumably, disgorgement is limited to what the majority calls "illegally obtained profits," i.e., the profit made from the fact that defendants held, for a few days between January and April 1977, a total soybean position exceeding 3,000,000 bushels. But, as the record makes clear, there *were no such profits*. Nor could there be. After a trial involving fourteen live witnesses, 125 multi-page exhibits, and some 30 depositions, there is not even a Commission suggestion that any defendant sold any contract at a price made higher because the defendants' total positions exceeded 3,000,000 bushels.

On the contrary, the Commission admitted, during the May hearings, that defendants' activities had no effect on the market. Thus each of defendants' sales must be presumed to have been made at the same (unaffected) market price at which it would have been made if the total positions had been equal to or less than 3,000,000 bushels. Absence of profits does not preclude declaration of a violation, but it would appear (if, as the majority says, disgorgement is remedial, not punitive) to preclude a requirement to disgorge what is not there.

In *SEC v. Manor Nursing Centers*, 458 F.2d at 1104-05, the court affirmed an order to disgorge proceeds from a fraudulent stock offering. It *reversed* an order to disgorge the profits made on those proceeds, because that order was not remedial relief to the stock purchasers, quoting *Levine v. Seilon, Inc.*, 439 F.2d 328, 334 (2d Cir. 1971) for the proposition that investors are "entitled to recover only the excess of what they paid over what they got." In the present case there is not the slightest evidence that any investors anywhere paid anything "over what they got" as a result of defendants' non-fraudulent violation. Nor does the Commission favor us with any indication of the nature or availability of any such evidence.

It must be remembered that *defendants* did not "aggregate" their holdings. The Regulation requires that holdings be aggregated *after* an "agreement or understanding" is found or inferred. A different situation would arise if a group, pursuant to an agreement,

combined their holdings and *thereby* increased the value thereof, or otherwise profited *from* the combination. Absent that circumstance, there simply are no "illegally" obtained profits to be disgorged.

Even if there were illegally obtained profits, and if it were possible to devise an equitable formula, and if the district court had nothing else to do, I would remain unable to find a basis for an order to disgorge in this case.

The Commission's attorney tell us that the Commission "moved only for a preliminary injunction" below, and that it made "no request for disgorgement and no argument on the propriety of that relief." The majority opinion, accepting that statement, begins with "no hearing on the merits of the property of this relief was held in the trial court" and with a characterization of the district judge's denial of the disgorgement prayer as "precipitous." That characterization is, I submit, and not to put too fine a point upon it, simply unfair to the district court.

About the trial below, the Commission's attorneys told its ALJ, in its concurrent administrative proceeding:

> *The order of the District Court in the matter of the CFTC v. N.B. Hunt, et al., (77 C 1489) satisfies this test.* After the District Court Denied the Commission's original motion for a preliminary injunction, the matter was set for trial. Extensive discovery was conducted by both parties. Several days of testimony was heard by the Court in both June and July of 1977. Findings were proposed by both sides, briefs submitted, *and a final decision rendered. In short, both the CFTC and respondents were accorded a full opportunity for an adversary hearing.* Additionally, the District Court ruling is a final order for purposes of appeal; it carries the label of a final order; *it disposes of all of the claims between parties;* jurisdiction has passed from the District Court to the Court of Appeals; *and the nature of the proceedings was such that the District Court had jurisdiction to render a final decision on the issues.* [Emphasis added.]

At no time did the Commission lack opportunity to press for the disgorgement remedy it specifically sought and separately emphasized in its complaint. The prayer for disgorgement was present throughout the trial and figured prominently in the district court's Memorandum Opinion and Order. Just as in *Grant*, the present Commission waited until it got here to complain "that it was deprived of a trial on the relief issue," and, as in *Grant*, "at no time was objection raised to the procedure by which the case was handled." If the Commission here was "deprived," who deprived it? Certainly not the district court. If the Commission had any objection to the procedure below, why was it not made below? In sum, where was there reversible error on the part of the district court?

It is not, of course, the function of an appellate court to encourage piecemeal litigation, or to provide a second opportunity to a litigant who waits until the appeal to merely say it had not argued for one of the remedies it sought in its complaint, or to a litigant who makes no showing of any additional evidence submittable on remand, or, particularly to a litigant who insists, to its advantage in another tribunal, that it had been accorded by the district court here, "a full opportunity for an adversary hearing" and had received a final order which "disposes of all the claims between the parties."

In all events, it would appear that under the circumstances a characterization of the district court's denial of disgorgement as "precipitous" is at best inappropriate.

The remainder of the majority opinion on this issue is devoted to the "close" question of whether disgorgement is a permissible remedy for violation of the Commodity Exchange Act. The absence of the remedy from the statute is met by reliance on the general equity powers of the courts (and silence in the Act regarding them), and on analogies drawn to the Securities Exchange Act and the Emergency Price Control Act. Because I believe disgorgement totally inappropriate in this case, I would await an appeal from a judgment in which the remedy was applied to discuss these questions.

For the moment, I would offer two caveats. The Commission argued in the May hearings below that Congress gave the Commission access to the courts where a violation was causing an emergency remediable only by injunction. If that be so, there is no basis in law for disgorgement here. Further, Congress' failure to provide the remedy may well lie in the impossibility of its application.[11] Securities and price controls relate to things in existence and to specific, individual dealings, having to do with a stock, a bond, or a prospectus, or the price of a specific product or products. Hence, both the amount of "profit" and the person or persons to whom retribution is owed may be determined in most cases with relative ease. The law of commodity futures contracts, as above indicated, deals with "contracts" on commodities not yet harvested or processed and from no specific farm or orchard. Decisions are made daily, to buy, sell, go "long" or "short" etc., etc., solely on the investor's estimate of what the market price of a particular commodity will be in the *future*. "Buyers" of "contracts" on specific future deliveries are normally unknown to "sellers" of those particular "contracts," and vice versa. The involved commodities may not be, and rarely if ever are, delivered to the personal possession of the investor-speculator. Disgorgement of what and to whom is thus, as the district court stated, equitably impossible.

Even if the district court had granted the remedy, and the impossibility of its equitable application had first appeared on the appeal, this court would have been warranted in reversing that grant. As was said by the Court in *Meccano, Ltd. v. John Wanamaker*, 253 U.S. 136, at 141 (1920): "[I]f insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated."

[11] That fact may also account for Congress' provision of criminal sanctions and fines of $100,000 for each day on which a violation continues. 7 U.S.C. §§ 9 and 13(b)(c) (1976).

Coming full circle, I would affirm the district judge's denial of the disgorgement remedy, (1) because the Commission had full opportunity to, and did, submit all of its evidence of defendants' activities, making no objection to the procedure below, and (2) because the district judge's finding of the impossibility of equitable application has not been shown to have been clearly erroneous.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States of America

BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

In The Matter of NELSON B. HUNT, W. H. HUNT, HOUSTON B. HUNT, ELIZABETH HUNT CURNES, MARY HUNT HUDDLESTON, ELLEN HUNT FLOWERS, DOUGLAS HUNT, HUNT HOLDINGS, INC., *Respondents*	CFTC Docket No. 78-7 COMPLAINT AND NOTICE OF HEARING PURSUANT TO §§ 6(b) AND 6(c) OF THE COMMODITY EXCHANGE ACT, AS AMENDED

I

1. The Commission's staff has gathered information which tends to show that the respondents, Nelson B. Hunt, W. H. Hunt, Houston B. Hunt, Elizabeth Hunt Curnes, Mary Hunt Huddleston, Ellen Hunt Flowers, Douglas Hunt and Hunt Holdings, Inc., and each of them singly and in concert, directly and indirectly, through the instrumentalities of interstate commerce and through the mails, have engaged, are engaged, or are about to engage in acts and practices which constitute and will constitute violations of Section 4a of the Commodity Exchange Act, as amended, ("Act") (7 U.S.C. § 6a) and Section 150.4 of the Regulations under the Act (17 C.F.R. 150.4). Said statute and regulation are in effect now and were in effect at all times relevant herein.

II

2. At relevant times, N. B. Hunt resided at 4508 Lakeside Drive, Dallas, Texas, and is the brother of respondent W. H. Hunt and the father of respondents Houston Bunker Hunt, Ellen Hunt Flowers, Mary Hunt Huddleston, and Elizabeth Hunt Curnes.

3. At relevant times, W. H. Hunt resided at 4205 McFarland Street, Dallas, Texas, and is the brother of the respondent N. B. Hunt and the father of respondent Douglas Hunt.

4. At relevant times, Douglas Hunt resided at 5903 Sandhurst, Dallas, Texas, and is the son of respondent W. H. Hunt.

5. At relevant times, Houston Bunker Hunt resided either at the Pi Kappa Alpha fraternity house, 3123 E. 7th Street, Tulsa, Oklahoma, or with his father, the respondent N. B. Hunt, at 4508 Lakeside Drive, Dallas, Texas.

6. At relevant times, Ellen Hunt Flowers resided at 3217 Colgate Avenue, Dallas, Texas, and is the daughter of respondent N. B. Hunt.

7. At relevant times, Mary Hunt Huddleston resided either at 6425 Westheimer or 4040 San Felipe, #250, Houston, Texas, and is the daughter of respondent N. B. Hunt.

8. At relevant times, Elizabeth Hunt Curnes, the former Elizabeth B. Hunt, resided either at the University of Alabama, Tuscaloosa Campus, P. O. Box 6183, University of Alabama, or with her father, the respondent N. B. Hunt, at 4508 Lakeside Drive, Dallas, Texas.

9. At relevant times, Hunt Holdings, Inc., was a closely held corporation, controlled and dominated by at least respondent Douglas Hunt, and is located at 2500 National Bank Building, Dallas, Texas; which is also the business mailing address used by the respondents for the transactions that are the subject of this complaint.

III

As a result of an investigation by the Commission's staff specific information has been obtained which tends to show and the Division of Enforcement alleges that:

VIOLATIONS OF SECTION 4a OF THE ACT (7 U.S.C. § 6a) AND SECTION 150.4 OF THE REGULATIONS THEREUNDER (17 C.F.R. § 150.4)

10. From at least January 17, 1977, until at least April 28, 1977, the respondents, directly and indirectly, by their combined positions in futures contracts traded on the Board of Trade of the City of Chicago, a designated contract market, and pursuant to an express or implied agreement or understanding, or through the direct or indirect control by one or more respondents of the trading of other respondents, exceeded, the maximum net positions for soybean futures contracts in any one future or in all futures combined, which has been established at 3,000,000 bushels under Section 4a of the Act (7 U.S.C. § 6a) and Section 150.4 of the regulations thereunder (17 C.F.R. § 150.4).

11. The transactions engaged in by the respondents in violation of Section 4a of the Act (7 U.S.C. § 6a) and Section 150.4 of the regulations thereunder (17 C.F.R. § 150.4) include at least those transactions set forth in exhibit A attached hereto and made a part hereof.

IV

12. By reason of the allegations made by the Commission's staff the Commission deems it necessary, appropriate and in the public interest, pursuant to its responsibilities under the Act, to institute public proceedings to determine:

a. whether the allegations set forth in Section III, *supra,* are true; and

b. whether pursuant to Section 6(b) of the Act, the Commission should prohibit each of the respondents from trading on or subject to the rules of any contract market, and require all contract markets to refuse trading privileges to said respondents;

c. whether, pursuant to Section 6(b) of the Act the Commission should assess a civil penalty against each respondent not in excess of $100,000.00 for each violation;

d. whether, pursuant to Section 6(c) of the Act, the Commission should enter an order directing each respondent to cease and desist from further violations of Section 4a of the Act and regulations thereunder.

V

Accordingly, IT IS ORDERED that this Complaint and Notice of Hearing be served upon Nelson B. Hunt, W. H. Hunt, Houston B. Hunt, Elizabeth H. Curnes, Mary Hunt Huddleston, Ellen Hunt Flowers, Douglas Hunt and Hunt Holdings, Inc.

IT IS FURTHER ORDERED that the record in that certain action styled *Commodity Futures Trading Commission* v. *N. B. Hunt, et al.,* Civ. No. 77-C-1489 (N.D. Ill.), *appeal pending,* (7th Cir.), shall be incorporated into the record and admitted into evidence in this administrative proceeding together with such other additional evidence as the Administrative Law Judge assigned to this matter determines should be admitted under the Act, the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) and the Commission's Rules of Practice (17 C.F.R. §§ 10.1 *et seq.*).

IT IS FURTHER ORDERED that this matter be set for a public hearing to take evidence on the issues set forth in Section IV of this Complaint and that all post-hearing procedures be conducted pursuant to Sections 10.81 through 10.107 of the Commission's Rules of Practice (17 C.F.R. §§ 10.81-10.107).

IT IS FURTHER ORDERED that Nelson B. Hunt, W. H. Hunt, Houston B. Hunt, Elizabeth Hunt Curnes, Mary Hunt Huddleston, Ellen Hunt Flowers, Douglas Hunt and Hunt Holdings, Inc. are required to file and serve an Answer to this Complaint within twenty (20) days after service. A failure to file and serve an Answer or otherwise respond to said Complaint and/or to appear at said hearing after being duly notified thereof shall be deemed a default and the proceedings may be determined against said respondents upon consideration of the Complaint and Notice of Hearing, the allegations of which may be deemed to be true.

By the Commission.

WILLIAM T. BAGLEY
William T. Bagley, Chairman

(Exhibits to the administrative complaint have been omitted.)

STATUTES AND REGULATION INVOLVED.

The relevant portions of §§ 4a, 6(b), 6(c) and 6c of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 6a, 9, 13b, and 13a-1, respectively, and Regulation 150.4 of the Commodity Futures Trading Commission Regulations, 17 C.F.R. 150.4, are as follows:

Statutes.

Sec. 4a (1). "Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the Commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person.***" (7 U.S.C. 6a).

* * *

"Sec. 6(b). If the Commission has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market,

or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Commission under this Act, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission thereunder, it may serve upon such person a complaint stating its charges in that respect. . . .*** Upon evidence received, the Commission may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or any person associated therewith as described in section 4k of this Act, commodity trading advisor, commodity pool operator, or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person, and may assess such person a civil penalty of not more than $100,000 for each such violation.*** After the issuance of the order by the Commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as the court may deem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition, within fifteen days after the notice of such order is given to the offending person, praying that the order of the Commission be set aside.*** Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission, as to the facts, if supported by the weight of the evidence, shall in like manner, be conclusive." (7 U.S.C. § 9).

Sec. 6(c). "If any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or otherwise is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission thereunder, the commission may, upon

notice and hearing, and subject to appeal as in other cases provided for in paragraph (b) of this Section, make and enter an order directing that such person shall cease and desist therefrom, and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such person shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $100,000, or imprisioned for not less than six month nor more than one year, or both . . ." (7 U.S.C. 13(b)).

Sec. 6c. "Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this Act, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions: *Provided,* That no restraining order or injunction for violation of the provisions of this Act shall be issued ex parte by said Court. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Commission, the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with the provisions of this Act or any rule, regulation, or order of the Commission thereunder, including the requirement that such person take such action as is necessary to remove the danger of violation of this Act or any such rule, regulation, or order. . . .*** Where the Commission elects to bring the action, it shall inform the Attorney General of such suit and advise him of subsequent developments." (7 U.S.C. 13a-1).

Regulation.

Reg. § 150.4. Limits on Position and Daily Trading in Soybeans for Future Delivery.

"The following limits on the amount of trading under contracts of sale of soybeans for future delivery on or subject to the rules of any contract market, which may be done by any person, are hereby proclaimed and fixed, to be in full force and effect on and after June 26, 1971:

(a) *Position limit.* The limit on the maximum net long or net short position which any person may hold or control in soybeans on or subject to the rules of any one contract market is 3,000,000 bushels in any one future or in all futures combined.

(b) *Daily trading limit.* The limit on the maximum amount of soybeans which any person may buy, and on the maximum amount which any person may sell, on or subject to the rules of any one contract, market during any one business day is 3,000,000 bushels in any one future or in all futures combined.

* * *

(f) *Application of limits.* The foregoing limits upon positions and upon daily trading shall be construed to apply, respectively, to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single individual." (17 C.F.R. § 150.4).

Supreme Court, U. S.
FILED
MAY 18 1979
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No. 78-1529

In the Supreme Court of the United States

OCTOBER TERM, 1978

N. B. HUNT, ET AL., PETITIONERS

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. The Commodity Futures Trading Commission is authorized by 7 U.S.C. 13a-1 to file an action in any district court seeking an injunction against any person who has engaged, is engaging or is about to engage, in any violation of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* Actions of this type were intended by Congress to be used to bring violations to a prompt halt. H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 68 (1974). The Commission also is authorized to institute administrative proceedings against alleged violators. 7 U.S.C. 9. Administrative proceedings under this section can lead to sanctions such as prohibition of violators from trading; the Commission also can impose penalties of

as much as $100,000 for each violation. These sanctions, which are subject to review by appropriate courts of appeals (7 U.S.C. 9), serve to deter future violations of the Act and to disable proven violators from repeating their offenses.

The Commission instituted an administrative proceeding on November 28, 1977, to determine whether petitioners' dealings in soybean futures violated the Commission's limits on the maximum size of speculative holdings. On April 28, 1977, the Commission also had filed suit seeking an injunction against petitioners' activities with respect to soybeans. The complaint in that suit alleged that petitioners had been exceeding the limit of 3 million bushels of soybean futures contracts that any person or affiliated group could hold. See 7 U.S.C. 6a(1) and 17 C.F.R. 150.4.

In the civil action the district court concluded that petitioners were violating the Act and regulation in issue. The court declined to issue an injunction, finding the probability of future violations slight. The court of appeals upheld the validity of 17 C.F.R. 150.4, affirmed the district court's finding that petitioners had violated the rule, and remanded for both the entry of an injunction and further consideration of the Commission's request that petitioners be required to disgorge their profits. *CFTC* v. *Hunt*, 591 F. 2d 1211 (7th Cir. 1979) (reprinted at Pet. App. 32a-73a).

On December 13, 1977, petitioners filed the instant suit, seeking an injunction against continuation of the Commission's administrative proceeding. Petitioners argued that the Commission must elect between judicial and administrative remedies for violations of the Act; having filed the civil suit first, the Commission was barred from taking administrative action, petitioners argued. Petitioners also objected to the use of the judicial proceedings to collect evidence that would be used in the administrative proceedings.[1]

The district court denied the request for relief, and the court of appeals affirmed (591 F. 2d 1234; Pet. App. 1a-18a). The court of appeals concluded that petitioners' suit is premature because they have not exhausted their administrative remedies. The argument that the filing of a civil suit precluded administrative action should be presented to and resolved by the Commission, the court held. It pointed out that there would be ample opportunity for judicial review if the Commission should resolve petitioners' arguments against them and enter any order that aggrieved petitioners.

2. The decision of the court of appeals, on which we generally rely, is correct. It applies established principles to the facts of this case. There is no conflict among the circuits concerning the application of the exhaustion doctrine to proceedings of the Commission, and there is no need for review by this Court.

"[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Petitioners have an administrative remedy: they can present their arguments to the Commission. And if the Commission rejects them, petitioners have a right to full judicial review. 7 U.S.C. 9. That is fatal to petitioners' attempt to obtain judicial review in advance

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[1]The Commission plans to make substantial use of the judicial record in the administrative proceedings. The administrative proceeding is pending before an administrative law judge.

of the administrative decision.[2] See also *McKart* v. *United States*, 395 U.S. 185, 194 (1969).

Petitioners attempt to avoid the exhaustion rule by arguing that the Commission's administrative proceedings "clearly" are foreclosed. But if petitioners are right that the Commission clearly is in error, then petitioners suffer no harm from carrying on with the administrative proceedings: a court is sure to vindicate them in the end, if the Commission persists in its asserted error.

Petitioners' reliance on cases such as *California* v. *FPC*, 369 U.S. 482 (1962), and *Mathews* v. *Diaz*, 426 U.S. 67 (1976), for the proposition that complaining parties need not exhaust their administrative remedies on questions that may be characterized as "legal" is unwarranted. *California* involved review of an antitrust issue lying outside the expertise of the affected agency. *Diaz* and similar cases involved the constitutionality of the very statute the agency was charged with administering. The agency had declined to examine the constitutionality of its own statute, and as a result the administrative proceedings came to an end. Here, however, the administrative proceedings are not at an end; they are just beginning. Petitioners do not raise a collateral issue outside the Commission's province; they challenge the proceeding itself. In these circumstances, "all questions of the jurisdiction of the [Commission] and the regularity of its proceedings, all questions of

[2]Petitioners suggest (Pet. 21) that 7 U.S.C. 9 limits judicial review to the facts found by the Commission and forecloses review of legal matters. But nothing in the statute expressly precludes review of legal matters, and review is not inconsistent with the statutory scheme. Review is therefore fully available. See 5 U.S.C. 702.

constitutional right or statutory authority, are open to examination by the court" after completion of the administrative proceeding. *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 49.

At all events, there is no clear error or any other pressing reason calling for judicial review. Section 6c of the Act, 7 U.S.C. 13a-1, on which petitioners rely as the basis for their argument that the Commission must elect between remedies, provides nothing of the sort. Section 6c authorizes the Commission to seek injunctions against violations of the Act and states that "[i]n lieu of bringing actions itself *pursuant to this section*, the Commission may request the Attorney General to bring the action" (emphasis added). Section 6c thus does establish an election: the Commission may elect to request election has nothing to do with the kind of election petitioners seek between judicial and administrative proceedings.

Parallel judicial and administrative proceedings are consistent with the purposes of the Act. Judicial relief can put a prompt halt to ongoing violations. Cf. *Parklane Hosiery Co.* v. *Shore*, No. 77-1305 (Jan. 9, 1979). Administrative action can supply penalties (civil fines and suspension from trading) not authorized in the injunctive actions, which usually have a more limited purpose. And although, as petitioners remark, the administrative and judicial proceedings in some cases could come to different conclusions about the culpability of the persons charged with wrongdoing, the differences often may be justified by the different purposes of the remedies. What is more, the judicial branch always has the last word, on review under 7 U.S.C. 9.

There is nothing unfamiliar in what the Commission is doing. The National Labor Relations Board long has had the power to seek injunctions under Section 10(j) and (*l*) of the National Labor Relations Act, 29 U.S.C. 160(j) and (*l*), at the same time as it commences proceedings on administrative charges of unfair labor practices. The Federal Trade Commission also is authorized to bring parallel judicial and administrative proceedings (see 15 U.S.C. 45, 53, 56, 57a, 57b), as is the Securities and Exchange Commission (see 15 U.S.C. 77t(b)). Congress recently rejected a proposed amendment to the Act that would have required the Commission to elect between judicial and administrative remedies. See H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 51 (1978). Petitioners' request that the courts read into the Act "what Congress has studiously omitted" should be rejected. *Great Atlantic & Pacific Tea Co.* v. *FTC*, No. 77-654 (Feb. 22, 1979), slip op. 8-9.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

JOHN G. GAINE
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vs.

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PETITIONERS' REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION.

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vs.

THE COMMODITY FUTURES TRADING COMMISSION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION.

The Memorandum for the Respondent in Opposition to the Petition for Writ of Certiorari (hereafter referred to as "Respondent's Memorandum") dodges the primary issue: complete and permanent relief is sought by the Commodity Futures Trading Commission ("CFTC") in both the judicial and administrative enforcement actions. For example, on page 5 of Respondent's Memorandum it is stated:

> "Parallel judicial and administrative proceedings are consistent with the purposes of the (Commodity Exchange) Act. Judicial relief can put a prompt halt to ongoing violations."

The authors of Respondent's Memorandum appear to misunderstand the nature of this case. Following the above-

quoted language, Respondents attempt to distinguish administrative and judicial actions on the ground that the latter "... usually have a more limited purpose." Petitioners agree. But as pointed out on pages 5-7 of the Petition for Writ of Certiorari filed herein, with respect to the instant action the CFTC seeks full and complete relief in both the judicial and administrative actions, which it admits are identical "in all material respects". (See Appendix to Brief of Appellants, *N. B. Hunt* v. *CFTC*, C.A. 7th, No. 77-1055, pp. 51-52).

Since the subject of the judicial enforcement action involves soybean futures contracts which matured almost two years ago, the suggestion that the judicial action is justified as seeking "a prompt halt to *ongoing* violations" is nonsense. The relief sought in the district court is not limited to an injunction, and the alleged violation could not possibly be ongoing. Duplicitous enforcement actions under the Commodity Exchange Act, each seeking complete and full relief, cannot be equated with limited injunctive proceedings by the NLRB, the FTC, or the SEC. See Respondent's Memorandum, p. 6.

On page 4 of the Respondent's Memorandum, it is stated:

> "But if petitioners are right that the Commission clearly is in error, the petitioners suffer no harm from carrying on with the administrative proceedings: a court is sure to vindicate them in the end, if the Commission persists in its asserted error."

As Justice Howard T. Markey noted in his dissenting opinion below, however, the CFTC's position is "at best fatuous" since the entire matter is already before the courts at the CFTC's behest. See *Hunt* v. *CFTC*, 591 F.2d 1234, 1239 (7th Cir. 1979).

Parklane Hosiery Co. v. *Shore*, No. 77-1305 (Jan. 9, 1979) is cited on page 5 of the Respondent's Memorandum as recognizing the validity of parallel judicial and administrative actions. *Parklane*, however, did not involve parallel proceedings. Unlike the instant action, in *Parklane* different plaintiffs prosecuted separate causes of action.

The quotation on page 3 of Respondent's Memorandum from *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) is inapplicable to the instant action. As noted in *Myers*, the NLRB has exclusive jurisdiction to enforce the National Labor Relations Act. The Commodity Exchange Act, on the other hand, may be enforced either in an administrative action *or* by a district court. Moreover, since NLRB orders are not self-executing, no penalty can accrue before the matter is reviewed by the courts. (303 U.S. at 48). Under the Commodity Exchange Act, on the other hand, an administrative order is effective upon issuance. The *Myers* case is further distinguished on pages 18-19 of the Petition.

On page 6 of Respondent's Memorandum it is asserted that

> "Congress recently rejected a proposed amendment to the [Commodity Exchange] Act that would have required the Commission to elect between judicial and administrative remedies. See H. R. Rep. No. 95-1181." (Bracketed information added).

As stated in said Report, however, the CFTC opposed the amendment on the ground that

> "(m)any times, in Federal court the Commission seeks injunctive relief *only*, and while the case is pending undertakes regulatory action, such as to revoke a registration or otherwise. This amendment would prevent the Commission from making use of its expertise in such instances." (Comm. Fu. L. Rep. (CCH) No. 75, June 26, 1978, p. 51) (Emphasis added).

Thus, the proposed amendment was rejected for reasons unrelated to the subject of the instant action. Consequently, there is no basis for the assertion that Congress tacitly approved duplicate judicial and administrative actions where complete and permanent relief is requested in each case. (Moreover, the proposed amendment was not rejected by Congress, as such, but by the House Committee on Agriculture).

A recent decision by the Second Circuit demonstrates the conflict between the circuit courts regarding the application of the exhaustion doctrine under the circumstances of this case. In *Touche Ross & Co.* v. *SEC,* ____ F.2d ____ (CA 2, May 10, 1979) (47 U.S.L.W. 2738), the SEC instituted an administrative proceeding under Rule 2(e) to determine whether the accounting firm had engaged in unethical, unprofessional or fraudulent conduct in auditing the financial statements of two corporations. The accounting firm thereupon brought a judicial action to enjoin the administrative proceeding, but the district court dismissed the suit because administrative remedies had not been exhausted. Reversing the district court, the Second Circuit held that while the SEC's administrative proceeding was not "plainly beyond the jurisdiction" of the agency, application of the exhaustion doctrine would have required the accounting firm to submit to the same procedures which it challenged. Since the question of the propriety of the administrative action was one of purely statutory interpretation, the Court held there was no need for the exercise of agency discretion or the application of agency expertise. Moreover, the Court noted that an administrative action would serve no real purpose since it was unlikely the SEC would invalidate its own rule. In contrast, the Seventh Circuit held in the instant action that under comparable circumstances the administrative enforcement action could not be challenged except by judicial review from final agency action.

CONCLUSION

This Court should take this opportunity to construe the relationship between § 6c and § 6(b) and (c) of the Commodity Exchange Act. The CFTC's practice of instituting duplicitous judicial and administrative actions, seeking complete relief in each, is a waste of judicial and administrative resources and an unjustifiable burden on petitioners and other similarly situated parties. This Court is respectfully requested to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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